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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 515

BEMIS BRO. BAG COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 12, 1932

CERTIORARI GRANTED JANUARY 23, 1933

(37,212)

(37,212)

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[fol. 1] Citation, in usual form, showing service on Claude M. Crooks, filed December 22, 1931, omitted in printing.

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

#8451

BEMIS BRO. BAG COMPANY, a Corporation, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

PETITION—Filed Jan. 2, 1929

Now comes the above named plaintiff and states as follows:

1. Plaintiff is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, having its principal office and place of business in and being a resident of the City of St. Louis and State of Missouri, in the Eastern Division of the Eastern Judicial District of Missouri.

2. This is a suit for the recovery of internal revenue taxes erroneously or illegally assessed and collected. George H. Moore, the Collector of Internal Revenue, by whom such taxes were collected, is not in office as Collector of Internal Revenue at this time.

3. For its first cause of action plaintiff says:

(a) In due time, as required by law, plaintiff filed in the office of the Collector of Internal Revenue at St. Louis, Missouri, its return of income received by it during the calendar year 1918, and its return of invested capital for said year and of its income and invested capital for the

pre-war period for the assessment of the income, war and excess profits taxes imposed by the Revenue Act of 1918, showing a total tax liability amounting to $3,947,513.30, which amount plaintiff duly paid in approximately equal quarterly installments, one on or about the 15th day of March, one on or about the 15th day of June, one on or about the 15th day of September, and one on or about the 15th day of December, 1919.

(b) Thereafter the Commissioner of Internal Revenue audited plaintiff's said return and on or about the month of March, 1920, assessed additional taxes for said year 1918, amounting to $99,214.98, which amount plaintiff duly paid on June 29, 1920, making the total amount of said taxes assessed against plaintiff and paid by plaintiff for said calendar year 1918, the sum of $6,046,728.28.

[fol. 3] (c) Thereafter and in due time, to-wit, on the 12th day of January, 1924, within less than five years after its return for said year was due, and within less than four years after the payment of said additional taxes assessed as aforesaid was made, plaintiff duly filed its claim for refund of part of the taxes paid by it for said year, copy of which claim is hereto attached, marked Exhibit "A." Attached to said claim for refund and by reference made a part thereof was a printed brief submitted with plaintiff's claim for refund theretofore filed for the year 1917. Said claim for refund claimed as the reasons for said refund that the excess profits tax and the war profits tax — the year 1918 should be assessed under the provisions of Section- 327 and 328 of the Revenue Act of 1918 and stated among others: (1) That at the date of the organization of the company, good will, together with tangible assets was transferred to the corporation for its capital stock and no calculation of the value of the property turned in for capital stock can be made, and in said claim it was stated as to said item that "if the value of the respective kinds of property could be satisfactorily determined this company would be entitled to additional invested capital." Also, (2), that all of plaintiff's printing plate equipment, including the metal, has been charged to expense and the original cost cannot be determined and assessment under said sections was claimed because plaintiff said the cost of these items, which should have been included in in-

vested capital if it could be determined, could not be determined.

(d) On December 13, 1926, plaintiff addressed to the Commissioner of Internal Revenue a letter concerning its claims for refund for the years 1917, 1918 and 1919, copy of which is hereto attached marked Exhibit "B," in which the following claim was made:

"(b) Additions to Surplus Account. In the claim heretofore filed we presented a list of capital items which had been charged to expense. This list did not purport to be exhaustive. If special assessment is denied the items listed should be restored to invested capital and the company's surplus should be increased accordingly. These items are as follows:"

Thereafter appears a list of items, which includes the printing equipment charged to expense upon which an increase in invested capital of $851,375.50 is claimed and the intangibles acquired at date of organization upon which an increase of invested capital of $227,500 is made.
[fol. 4] In said letter it is also asserted that "the cost of the metal alone in the patterns and plates together with the type in this equipment at the minimum price per pound which has ever prevailed since the Company started to accumulate this equipment was not less than $300,000."

(e) On April 12, 1927, plaintiff mailed to the Commissioner of Internal Revenue letter, concerning claims for refund for the years 1917 to 1919 inclusive, copy of which is hereto attached marked Exhibit "C," in which the opening paragraph is as follows:

"This letter is written in response to your request made at conference in your office on February 23, for more detailed information on some of the facts presented to you. These facts were and are urged as elements of the right to special assessment and they are also urged as a basis for allowance of additional invested capital. We are unable to disclose and sustain the full invested capital to which the company is entitled by virtue of the facts hereinafter stated and heretofore presented to you. The invested capital to which we have made claim is the minimum invested capital to which the company is entitled."

Thereafter appear the details concerning the acquisition of said printing equipment and the cost of the metal contained therein, and the acquisition of said good will acquired at organization.

(f) On December 17, 1927, the Commissioner of Internal Revenue addressed to plaintiff the letter hereto attached marked Exhibit "D"; as shown by said letter the Commissioner has determined that the cost of the items last above mentioned can be determined to his satisfaction and that the cost of the metal in said printing equipment possessed by the plaintiff on December 31, 1917, was the sum of $129,372.93, and the cost of the good will acquired by plaintiff at the date of its organization with its capital stock was, to-wit, the sum of $68,134.27, and that because of the decrease of the tax for the year 1917, (for which also claim for refund was filed,) due among other reasons to the amounts of invested capital by virtue of said last two mentioned items, the reduction of invested capital for the year 1918 because of the tax for the year 1917 should also be decreased. That as shown by said Exhibit "D" the Commissioner of Internal Revenue has found that said taxes were overassessed and overpaid by plaintiff for said year in the sum of $14,054.18, but refuses to refund said overpayment for the following reasons stated in said letter hereto attached, marked Exhibit "D":

[fol. 5] "Inasmuch as computation of your tax liability for 1918 and 1919 under the provisions of Section 327 and 328 of the Revenue Act of 1918 is denied and your claim for the refunding of $1,270,907.97 for 1918 is confined to that point, it will be rejected in full in the next schedule to be approved by the Commissioner.

"The overassessments indicated for 1918 and 1919, not being covered by proper claims are barred by the Statute of Limitations and cannot be allowed."

(g) Plaintiff's correct net income for said year 1918 was the sum of $10,154,059.75, of which income the sum of $46,737.32 was interest upon United States obligations exempt from the excess profits tax and war profits tax for said year but not exempt from income tax; its correct invested capital for said year was the sum of $22,070,422.75; its average invested capital for the prewar period was $10,094,253.54, and

its average net income for the prewar period was $2,091,525.88. Plaintiff's excess profits credit for the excess profits tax was $1,768,633.82 and its war profits credit for the war profits tax was $3,292,142.80, and the total amount of plaintiff's liability for excess profits, war profits and income taxes for said year was, to-wit, $6,043,428.22, against which it was entitled to a credit of $10,754.12, profits taxes paid to Canada for said year. The net excess profits, war profits and income taxes owing by the plaintiff to the United States for said year was $6,032,674.10. As stated above there was assessed against plaintiff for said taxes and plaintiff paid therefor the sum of $6,046,728.28, whereby plaintiff was overassessed and overpaid the sum of $14,054.18. All of the facts and figures stated above in this paragraph are in accordance with the findings of the Commissioner of Internal Revenue, as shown by his said letter hereto attached, marked Exhibit "D".

(h) The Commissioner of Internal Revenue rejected plaintiff's said claim for refund by his said letter dated December 17, 1927, for the reasons above stated. Plaintiff states that the facts as found by the Commissioner of Internal Revenue as reasons and basis for said overassessment were duly stated in said claim for refund, in connection with which facts it was asserted in said claim for refund that if the cost of such items could be determined such cost should be allowed as invested capital. That said claim for refund was a proper claim for the refund resulting from the allowance of the cost of said items as invested capital and that the Commissioner of Internal Revenue erroneously and improperly refuses to make said refund.

[fol. 6] (i) Wherefore plaintiff prays judgment against the United States on this its first cause of action for the amount of the overpayment for said year 1918 in the amount thereof determined by the Commissioner of Internal Revenue, to-wit, for the sum of $14,054.18, with interest thereon at the rate of six per cent per annum from the 29th day of June, 1920, as provided by law, together with its costs herein expended.

4. For a further and other cause of action, plaintiff says:

(a) In due time, as required by law, plaintiff filed in the office of the Collector of Internal Revenue at St. Louis, Mis-

souri, its return of income received by it during the calendar year 1919, and its return of invested capital for said year for the assessment of the excess profits tax and income tax imposed by the Revenue Act of 1918, showing a total tax liability for said year amounting to $2,965,124.51, which amount plaintiff duly paid in approximately equal quarterly installments, one on or about the 15th day of March, one on or about the 15th day of June, one on or about the 15th day of September, and one on or about the 15th day of December, 1920.

(b) Thereafter the Commissioner of Internal Revenue audited plaintiff's said return and on or about the month of October, 1920, assessed additional taxes for said year 1919 amounting to $34,630.31, which amount plaintiff duly paid on December 16, 1920, making the total amount of said taxes assessed against plaintiff and paid by plaintiff for said calendar year 1919, the sum of $2,999,754.82.

(c) Thereafter, and in due time, to-wit, on the 10th day of December, 1924, within less than five years after its return for said year was due and within less than four years after the payment of said additional taxes assessed as aforesaid was made, plaintiff filed its claim for refund of part of the taxes paid by it for said year, copy of which claim is hereto attached marked Exhibit "E". Attached to said claim for refund and by reference made a part thereof, was a printed brief submitted with plaintiff's claim for refund theretofore filed for the year 1917. Said claim for refund claimed as the reasons for said claim for refund that the excess profits tax for the year 1919 should be assessed under the provisions of Sections 327 and 328 of the Revenue Act of 1918 and stated among others: (1) That at the date of the organization of the company, good will, together with tangible assets was transferred to the corporation for its capital stock and no calculation of the value of the property [fol. 7] turned in for capital stock can be made, and in said claim it was stated as to said item that "if the value of the respective kinds of property could be satisfactorily determined this company would be entitled to additional invested capital." Also, (2) that all of plaintiff's printing plate equipment, including the metal, has been charged to expense and the original cost cannot be determined and assessment under said sections was claimed because plaintiff said the

cost of these items which should have been included in invested capital if it could be determined, could not be determined.

(d) On December 13, 1926, plaintiff addressed to the Commissioner of Internal Revenue the letter concerning its claims for refund for the years 1917, 1918 and 1919, copy of which is hereto attached marked Exhibit "B", in which the following claim was made:

"(b) Additions to Surplus Account. In the claim heretofore filed we presented a list of capital items which had been charged to expense. This list did not purport to be exhaustive. If special assessment is denied the items listed should be restored to invested capital and the company's surplus should be increased accordingly. These items are as follows:"

Thereafter appears a list of items, which includes the printing equipment charged to expense upon which an increase in invested capital of $851,375.50 is claimed and the intangibles acquired at date of organization upon which an increase of invested capital of $227,500 is made.

In said letter it is also asserted that "the cost of the metal alone in the patterns and plates, together with the type in this equipment at the minimum price per pound which has ever prevailed since the Company started to accumulate this equipment was not less than $300,000."

(e) On April 12, 1927, plaintiff mailed to the Commissioner of Internal Revenue letter, concerning claims for refund for the years 1917 to 1919 inclusive, copy of which is hereto attached marked Exhibit "C", in which the opening paragraph is as follows:

"This letter is written in response to your request made at conference in your office on February 23, for more detailed information on some of the facts presented to you. These facts were and are urged as elements of the right to special assessment and they are also urged as a basis for allowance of additional invested capital. We are unable [fol. 8] to disclose and sustain the full invested capital to which the company is entitled by virtue of the facts hereinafter stated and heretofore presented to you. The invested capital to which we have made claim is the minimum invested capital to which the company is entitled."

Thereafter appear the details concerning the acquisition of said printing equipment and the cost of the metal contained therein, and the acquisition of said good will acquired at organization.

(f) On December 17, 1927, the Commissioner of Internal Revenue addressed to plaintiff the letter hereto attached marked Exhibit "D"; as shown by said letter the Commissioner has determined that the cost of the items last above mentioned can be determined to his satisfaction and that the cost of the metal in said printing equipment possessed by the plaintiff on December 31, 1917, was the sum of $129,-372.93, and the cost of the good will acquired by plaintiff at the date of its organization with its capital stock was, to-wit, the sum of $68,134.27, and that because of the decrease of the tax for the year 1918, (for which also claim for refund was filed), due among other reasons to the amounts of invested capital by virtue of said last two mentioned items, the reduction of invested capital for the year 1919 because of the tax for the year 1918 should also be decreased. That as shown by said Exhibit "D" the Commissioner of Internal Revenue has found that said taxes were overassessed and overpaid by plaintiff for said year in the sum of $9,073.15, but refuses to refund said overpayment for the following reasons stated in said letter hereto attached, marked Exhibit "D":

"Inasmuch as computation of your tax liability for 1918 and 1919 under the provisions of Sections 327 and 328 of the Revenue Act of 1918 is denied and your claim for the refunding of $1,270,907.97 for 1918 is confined to that point, it will be rejected in full in the next schedule to be approved by the Commissioner.

"Your claim for the computation of your tax liability for 1919 under the provisions of Sections 327 and 328 has already been rejected.

"The overassessments indicated for 1918 and 1919, not being covered by proper claims are barred by the Statute of Limitations and cannot be allowed."

(g) Plaintiff's correct net income for said year 1919 was the sum of $9,594,386.01, of which income the sum of $49,-[fol. 9] 284.17 was interest upon United States obligations exempt from the excess profits tax for said year but not ex-

empt from income tax; its correct invested capital for said year was the sum of $25,830,117.28; its excess profits credit for the excess profits tax was $2,069,409.38, and the total amount of plaintiff's liability for excess profits and income taxes for said year was, to-wit, $3,105,911.23, against which it was entitled to a credit of $115,229.56 profits taxes paid to Canada for said year. The net excess profits and income taxes owing by the plaintiff to the United States for said year 1919 was $2,990,681.68. As stated above, there was assessed against plaintiff for said taxes and plaintiff paid therefor the sum of $2,999,754.82, whereby plaintiff was overassessed and overpaid the sum of $9,073.15.

(h) The Commissioner of Internal Revenue rejected plaintiff's said claim for refund by his said letter dated December 17, 1927, for the reasons above stated. Plaintiff states that the facts as found by the Commissioner of Internal Revenue as reasons and bases for said overassessment were duly stated in said claim for refund, in connection with which facts it was asserted in said claim for refund that if the cost of such items could be determined such cost should be allowed as invested capital.

(i) Wherefore plaintiff prays judgment against the United States on this, its second cause of action for the amount of the overpayment for said year 1919, in the amount thereof determined by the Commissioner of Internal Revenue, to-wit for the sum of $9,073.15, with interest thereon at the rate of six per cent per annum from the 16th day of December, 1920, as provided by law, together with its costs herein expended.

Spencer M. Thomas, Lowenhaupt & Waite, Attorneys for Plaintiff.

Duly sworn to by J. S. Bemis. Jurat omitted in printing.

[fol. 10] IN UNITED STATES DISTRICT COURT

ANSWER—Filed May 14, 1931

Comes now the United States of America, defendant in the above entitled cause, by its attorney, Claude M. Crooks,

Assistant United States Attorney for the Eastern District of Missouri, and for answer to plaintiff's petition:

Admits the allegations in Paragraph 1.

Answering Paragraph 2, defendant admits that George H. Moore, Collector of Internal Revenue, by whom the taxes were collected, referred to in the petition, is not now in office as Collector of Internal Revenue, and was not at the time this suit was instituted.

Each and every other allegation contained in said petition, except those admitted above, are hereby denied.

Wherefore, defendant having fully answered, prays to go hence with its proper costs.

Claude M. Crooks, Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

AGREED STATEMENT OF FACTS—Filed May 14, 1931

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other or further evidence not inconsistent with the facts herein stipulated to be true:

I

On March 15, 1919, plaintiff filed a tentative return, and on or about May 15, 1919, filed the completed corporation income and profits tax return for the calendar year 1918 with the Collector of Internal Revenue at St. Louis, Missouri, showing a total tax liability for said year amount-[fol. 11] ing to $5,947,513.30, which amount was duly assessed and plaintiff duly paid as follows:

$1,496,564.55 on March 15, 1919;
1,477,192.10 on June 15, 1919;
1,486,878.33 on Sept. 15, 1919;
1,486,878.32 on Dec. 15, 1919.

II

The Commissioner of Internal Revenue audited plaintiff's return for said year 1918 and in May, 1920, assessed

additional income and excess profits taxes for said year 1918, amounting to $99,214.98 of which amount $98,549.28 was paid on June 30, 1920, and $665.70 was paid by credit applied by the Commissioner of Internal Revenue on May 18, 1922, which credit was due plaintiff on an overpayment of taxes for a prior year, making the total amount of said taxes assessed against and paid by plaintiff for the year 1918, $6,046,728.28.

III

Thereafter, on the 29th day of February, 1924, plaintiff filed with the Collector of Internal Revenue at St. Louis, Missouri, its claim for refund of part of the taxes paid by it for said year 1918. A copy of said claim for refund is hereunto attached, marked Exhibit "A" and made a part hereof, (with the exception of the details of calculation of the cost of printing equipment set forth at the end of said claim for refund as Exhibit 1 thereto, which details are deemed immaterial to this action).

IV

On March 13, 1920, plaintiff filed, in the office of the Collector of Internal Revenue at St. Louis, Missouri, its corporation income and profits tax return for the calendar year 1919, showing a total tax liability for said year or $2,965,-124.51, which amount plaintiff duly paid in equal quarterly installments of $741,281.13 each on March 16, 1920, June 15, 1920, September 15, 1920 and December 15, 1920, respectively.

V

Thereafter, the Commissioner of Internal Revenue audited the plaintiff's said return for said year 1919 and in November, 1920, assessed additional income and excess profits taxes for said year 1919 in the sum of $34,630.31, which amount the plaintiff duly paid on December 16, 1920, making the total amount of said taxes assessed against and paid by plaintiff for said year 1919, $2,999,754.82.

[fol. 12]

VI

Thereafter, on December 12, 1924, plaintiff filed with the Collector of Internal Revenue at St. Louis, Missouri, its claim for refund of part of the taxes paid by it for said

year 1919. A copy of said claim for refund is hereunto attached, marked Exhibit "B" and made a part hereof, (with the exception of the details of the calculation of the cost of printing equipment set forth at the end of said claim for refund as Exhibit 1 thereto, which details are deemed immaterial to this action).

VII

Under date of October 30, 1926, the Commissioner of Internal Revenue addressed a letter to plaintiff, which was duly received by plaintiff, with reference to said claim for refund for 1919. A copy of said letter is hereunto attached, marked Exhibit "C" and made a part hereof.

VIII

Under date of November 27, 1926, the Commissioner of Internal Revenue addressed a letter to plaintiff, which was duly received by plaintiff, with reference to said claim for refund for 1918. A copy of said letter is hereunto attached, marked Exhibit "D" and made a part hereof.

IX

On December 13, 1926, plaintiff addressed to the Commissioner of Internal Revenue a letter of protest concerning its claims for refund for the years 1917, 1918 and 1919, which letter was duly received by said Commissioner. A copy of said letter is hereunto attached, marked Exhibit "E" and made a part hereof.

X

After receipt of said letter of December 13, 1926, the Commissioner of Internal Revenue arranged a conference for the discussion of plaintiff's claims set out in said claims for refund for 1918 and 1919. Said conference was held on [held on] February 25, 1927, and there were present representatives of said Commissioner of Internal Revenue, and plaintiff's attorney. At said conference said representatives of said Commissioner of Internal Revenue requested additional detailed information on some of the facts presented by plaintiff concerning its claims in said claims for refund.

[fol. 13]

XI

On April 12, 1927, plaintiff mailed to the Commissioner of Internal Revenue a letter concerning its claims for refund for the years 1917, 1918 and 1919, which letter was duly received by said Commissioner. A copy of said letter is hereunto attached, marked Exhibit "F" and made a part hereof.

XII

Thereafter, the Commissioner of Internal Revenue transmitted to the Internal Revenue Agent in Charge, St. Louis, Missouri, copies of said claims for refund with the request that he examine into the facts and submit his report thereon. Internal Revenue Agent Edward P. Beffa was assigned to the work and made an examination of plaintiff's books and records and prepared a report thereon, which report was transmitted to said Commissioner of Internal Revenue by the Internal Revenue Agent in Charge with a letter of transmittal dated July 27, 1927. A copy of said letter of transmittal is attached hereto, marked "Exhibit G" and made a part hereof.

XIII

On December 17, 1927, the Commissioner of Internal Revenue addressed a letter to the plaintiff, which letter was duly received by plaintiff, in which it was stated that plaintiff had overpaid its taxes for the year 1918 in the amount of $14,054.18, and for the year 1919 in the amount of $9,073.15, but that such overpayments were barred by the statute of limitations. A copy of said letter is hereunto attached, marked Exhibit "H" and made a part hereof.

XIV

Thereafter, on December 22, 1927, plaintiff addressed to the Commissioner of Internal Revenue a letter concerning its claims for refund for the years 1917 and 1919, which latter was duly received by the Commissioner. A copy of said letter is hereunto attached, marked Exhibit "I" and made a part hereof.

XV

On January 20, 1928, the Commissioner of Internal Revenue addressed a letter to plaintiff, which letter was duly

received by plaintiff, in answer to plaintiff's said letter of December 22, 1927. A copy of said letter is hereunto attached, marked Exhibit "K" and made a part hereof.

[fol. 14] XVI

Copies of the tentative return and of the completed corporation income and profits tax return of the taxpayer for the year 1918, filed by the taxpayer as stated in paragraph I of this stipulation, are hereunto annexed, marked Exhibits "L" and "M" respectively, and made a part hereof. (The schedules attached to the completed corporation income and profits tax return are omitted from the copy.)

XVII

Copy of the corporation income and profits tax return of the taxpayer for the year 1919, filed by the taxpayer as stated in paragraph IV of this stipulation, is hereunto annexed, marked Exhibit "N" and made a part hereof.

XVIII

Plaintiff alleges in its complaint that it is entitled to recover an overpayment of its taxes for the year 1918 on the ground that its invested capital for that year is a larger amount than was stated in its return for 1918, and in the Commissioner's audit thereof referred to in paragraph II of this stipulation.

Plaintiff alleges in its complaint that it is entitled to recover an overpayment of its taxes for the year 1919 on the ground that its invested capital for that year is a larger amount than was stated in its return for 1919, and in the Commissioner's audit thereof referred to in paragraph V of this stipulation.

If the plaintiff, within the time provided by law, filed claims for refund for the years 1918 and 1919, respectively, which under the law were sufficient to be the required preliminary for the maintenance of this action on that ground, above stated, then plaintiff will be entitled to judgment for the year 1918 in the amount of $14,054.18 with interest, and for the year 1919 in the amount of $9,073.15 with interest.

If the claims for refund filed by the plaintiff for the years 1918 and 1919, respectively, were not sufficient under

the law to be the required preliminary for the maintenance [fol. 15] of this action on that ground, then defendant will be entitled to judgment dismissing this action.

Claude M. Crooks, Asst. U. S. Atty., Attorney for Defendant. Spencer M. Thomas, N. S. Waite, A. Lowenhaupt, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

JUDGMENT—September 23, 1931

Now the Court having considered the issues herein joined, doth announce its oral opinion finding such issues in favor of defendant and against plaintiff and doth award judgment accordingly.

It is, therefore, pursuant to the finding and award of judgment as aforesaid, Ordered and Adjudged that plaintiff, Bemis Bros. Bag Company, a corp., take nothing by its suit in this behalf against defendant, United States of America, and that said defendant go hence without day and recover of and from said plaintiff its costs and charges herein expended, for all of which costs and charges let execution issue against said plaintiff upon præcipe filed therefor by defendant.

IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL SUBMITTED—September 28, 1931

Now come the parties by their respective attorneys, and now plaintiff by leave of Court files herein its motion for a new trial; whereupon said motion is submitted to the Court without argument.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION FOR NEW TRIAL—December 5, 1931

Now, the Court having considered the motion of plaintiff for a new trial, doth Order that such motion be, and the same is hereby, overruled.

[fol. 16] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Dec. 22, 1931

To the Honorable Charles B. Faris, judge of said court:

Now comes Bemis Bros. Bag Company, a corporation, plaintiff in the above entitled cause, by Spencer M. Thomas and Abraham Lowenhaupt, its attorneys, and feeling itself aggrieved by the final judgment of this Court, entered on the 23rd day of September, 1931, and the overruling of plaintiff's motion for a new trial on the 5th day of December, 1931, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons set forth in its assignment of errors filed herewith, and said Bemis Bros Bag Company, prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Eighth Circuit, under the rules of such Court in such cases made and provided.

And your petitioner further prays that the proper order, relating to the required security to be required of it, be made.

Abraham Lowenhaupt, Spencer M. Thomas, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Dec. 22, 1931

Now comes the plaintiff in the above-entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above-entitled cause from the judgment rendered by this Honorable Court in said cause.

I

That the judgment of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri is contrary to the law and the evidence in this, to wit:

It is stipulated that plaintiff is entitled to the refund of said overpayment of taxes in suit, if the claims for refund filed by plaintiff were sufficient. The suit is for overpayments of taxes for 1918 and 1919 resulting from plain-
[fol. 17] tiff's right to additional invested capital in the calculation of its excess-profits tax on account of the printing equipment purchased and charged to expense and goodwill purchased in 1885 and not set up on the accounts. The facts concerning these items were set forth in plaintiff's original claim for refund filed in due time (exhibits A and B of the agreed statement of facts). The Court found that the only facts stated on said claims for refund were the facts stated upon the face of the form provided by the Treasury Department and in error overlooked or disregarded the facts stated in the exhibits attached to said forms and constituting a part of said claims.

II

That the judgment of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri is contrary to the facts and the law in the case in this, to-wit:

That plaintiff is entitled to the additional invested capital for the years 1918 and 1919 as alleged in its petition and as stipulated between the parties. Plaintiff within the statutory period filed a sufficient claim for refund for each of said years. The judgment of the court should have been in favor of the plaintiff.

III

That the Court erred in finding that under the stipulation and agreement of the parties as to the facts plaintiff was not entitled to recover from defendant the amount sued for in its petition.

Wherefore appellant prays that the judgment entered by the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, be reversed.

Abraham Lowenhaupt, Spencer M. Thomas, Attorneys for Appellant.

Copy of above received this 22nd day December, 1931.

Claude M. Crooks, Asst. U. S. Atty.

[fol. 18] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL TO PLAINTIFF BEMIS BRO. BAG COMPANY—Filed Dec. 22, 1931

Now, on this day, comes the plaintiff Bemis Bro. Bag Company, a corporation, by its solicitors; come also, by its solicitors, the United States of America, defendant in this cause; and thereupon said plaintiff presented its Assignment of Errors; and upon consideration thereof said petition for appeal is allowed and the Court doth allow the said plaintiff an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the final judgment and decree rendered herein on the 23rd day of September, 1931, upon the filing of an appeal bond in the sum of Five Hundred Dollars ($500.00) conditioned according to law with good and sufficient security to be approved by the Court.

C. B. Faris, Judge.

IN UNITED STATES DISTRICT COURT

RECORD ENTRY SHOWING ISSUANCE OF CITATION AND FILING OF BILL OF EXCEPTIONS—December 22, 1931

Now, a citation is issued and filed, directed to defendant, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit within forty days from and after this date. And now comes plaintiff and presents its bill of exceptions, which said bill of exceptions is allowed, approved, signed, filed and ordered made a part of the record herein; thereupon plaintiff is granted ten days from this date within which to file its bond on appeal.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed Dec. 22, 1931

Be it remembered that upon the trial of this cause during the March Term, A. D. 1931, of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, on the 14th day of May, 1931,

before the Honorable Charles B. Faris, the following proceedings were had:

Appearances: Mr. Spencer M. Thomas and Mr. Abraham Lowenhaupt for Plaintiff and Mr. Frederick Dewart, Special Attorney, Bureau of Internal Revenue, and Claude M. [fol. 19] Crooks, Assistant United States Attorney, for Defendant.

And thereupon plaintiff to sustain the issues in its behalf, filed and offered in evidence the agreed statement of facts together with Exhibits A to N, both inclusive, which are in words and figures, as follows:

* * * * * * *

MEMORANDUM RE AGREED STATEMENT OF FACTS

The Agreed Statement of Facts appeared as a part of the Bill of Exceptions at this place in the original typewritten transcript, but is omitted from the printed record to avoid duplication. The Agreed Statement of Facts will be found at marginal page 10 of this printed record.

(Clerk here copy Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, and N, to said Agreed Statement of Facts.)

(CLERK'S MEMO.—Exhibits are inserted elsewhere in transcript.)

RECITAL AS TO BRIEFS

Thereupon said case was taken as submitted. Counsel for plaintiff is thereupon given thirty days within which to file a brief. Counsel for defendant is given thirty days thereafter to file its brief and twenty days thereafter for plaintiff to reply if it so desires.

And thereafter, to-wit, on September 23, 1931, the Court rendered judgment in favor of defendant, and filed at the same time a memorandum opinion giving the reason there-

for, which memorandum opinion is in words and figures as follows:

OPINION OF DISTRICT COURT

FARIS, J.:

This is an action brought by the plaintiff to recover from the defendant a certain sum of money alleged to have been overpaid on taxes. The Collector involved being out of office, the suit was brought directly against the United States of America.

The case was submitted on an agreed statement of facts, wherein the single question up for judgment was agreed to be whether plaintiff in its application for a refund (or ever before the statute of limitations ran) stated the facts or [fol. 20] grounds upon which it bottomed its right to a refund. Much controversy is waged over whether the facts or the grounds are to be stated. The statute relied on seems to use the word facts as the things which must be stated in such an application; while the courts (perhaps deeming the words, in a way, synonymous) rather uniformly use the word grounds, as the things which must be set up as a condition precedent to relief.

Plaintiff first specifically asked for a special assessment as the ground for a reduction of the taxes for the years of 1918 and 1919. This was finally refused. After the statute of limitations ran against plaintiff, it contended, and now contends, that the value of certain materials in its printing plant, long on hand and used by it, should have been added to capital, and which value when added would have reduced its taxes for the years 1918 and 1919 by something like twenty-three thousand dollars, for which, in this action, it prays judgment.

Plaintiff further contends that, even if the genus special assessment does not include the species addition to capital on account of printing material, yet, the Commissioner of Internal Revenue waived the point by an examination of the facts in 1926.

True it seems to be, that the Commissioner about the time stated reached the conclusion that had this printing material been added to invested capital it would so far have increased the latter as that the taxes exacted for 1918 and 1919 would have been decreased by the amount set out in the stipulation, namely, twenty-three thousand dollars.

Having reached this conclusion, however, the Commissioner then denied the claim on the ground that the statute of limitations had run prior to the time at which the present claim was made, as now made.

I take leave to doubt if any ordinary officer of the Government may waive the statute of limitations so as to render the Government liable (Finn vs. United States, 123 U. S. 227; Tucker vs. Alexander, 275 U. S. 228) or bring about by action or inaction a state of facts which would toll the statute of limitations. The case of Tucker vs. Alexander, supra, was a case wherein the waiver enforced by the Court, was made before the statute ran, not afterwards, as here. I think there was no waiver here. What in effect the Commissioner did was to ascertain how much plaintiff would be entitled to if it did sue. The information [fol. 21] has its use here in this action, at any rate.

The facts or grounds stated by plaintiff in its application for a refund, are that, "The excess profits tax and the war profits tax against this Company for the year 1918 should be assessed under the provisions of Sections 327 and 328 of the Revenue Act of 1918."

It is contended, however, that an examination and audit of plaintiff's books would have shown the fact of the existence of the printing materials, and thereupon, under the law, it would have been the duty of the Commissioner to add this item to invested capital. Obviously, the facts or grounds above recited give no hint of this present contention. Whether the statute means facts, as it says, or grounds, as the courts say, I think it clear that it means more than to say, as the contention of plaintiff in effect is, that "facts should be stated in such wise that other facts being deduced, or found on investigation, relief may be accorded." Especially would this seem so in the light of the fact that it has been said that "meticulous compliance by the taxpayer with the prescribed conditions must appear before he may recover" (Mass & Woldstein Company vs. United States, 283 U. S., 583; Lucas vs. Pilliard Lumber Company, 281 U. S., 249).

It would have been easy to say that the ground for relief was that invested capital should have been, but was not, increased by the addition of the value or worth of printing material on hand and owned.

I do not think the facts set out in the application fairly embrace the facts now relied on; hence, the judgment will be for the defendant, that it go hence and recover its costs.

To which action and judgment of the Court the plaintiff, by its counsel, duly excepts and continues to except.

And thereafter, to-wit, on September 28, 1931, the plaintiff filed its motion for new trial, which motion for new trial is in words and figures as follows:

MOTION FOR NEW TRIAL

Now comes the plaintiff in the above entitled cause and moves the Court to set aside its finding and judgment in the above entitled cause and to grant a new trial of the issues therein for the following reasons:

[fol. 22] 1. Because the finding and judgment of the Court are contrary to the evidence submitted in the cause.

2. Because under the stipulation and agreed statement of facts the finding and judgment of the Court should have been in favor of plaintiff and against the defendant.

3. Because under the law and the evidence submitted to the Court, plaintiff is entitled to recover.

4. The Court erred in returning judgment for the defendant on the Court's statement of the law in the case.

5. The Court found the facts contrary to the agreed statement of facts and misconceived the evidence in the case.

(Signed) Abraham Lowenhaupt, (Signed) Spencer M. Thomas, Attorneys for Plaintiff.

And thereafter, to-wit, on December 5, 1931, plaintiff's motion for new trial was by the Court overruled, and the Court filed at the same time a memorandum opinion giving the reason for overruling said motion for new trial, which memorandum opinion is in words and figures as follows:

OPINION ON OVERRULING OF MOTION FOR NEW TRIAL

Motion for new trial in this case will be overruled. On account of the insistence of counsel (of the sincerity of

which the Court is thoroughly convinced) and because counsel were so seriously insistent, I have given much time and trouble to a consideration of the motion for a rehearing.

The questions involved are very nice, close and difficult ones. There is, of course, as always, a chance that the Court was in error.

After many days' examination of all the authorities that counsel called my attention to, and what I was able to find by my own investigations, I have reached the conclusion that the motion ought to be overruled, which is accordingly ordered.

To which action of the Court in overruling its motion for new trial, the plaintiff, by its counsel, duly excepts and continues to except.

[fol. 23] IN UNITED STATES DISTRICT COURT

APPROVAL OF BILL OF EXCEPTIONS BY DISTRICT JUDGE AND COUNSEL FOR DEFENDANT

Forasmuch as said matters do not appear of record herein, the plaintiff has prepared and now presents this, its Bill of Exceptions, and prays that the same may be signed, sealed, and made a part of the record, which is accordingly done on this 22nd day of December, 1931.

C. B. Faris, Judge Eastern Division of the Eastern Judicial District of Missouri. (Seal.)

Approved by:
Claude M. Crooks, Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

RECORD ENTRY OF APPROVAL OF BOND ON APPEAL—December 26, 1931

Now comes the plaintiff and presents its bond on appeal in the sum of Five Hundred Dollars ($500.00) which said bond is approved and filed.

Bond on appeal for $500.00, approved and filed December 26, 1931, omitted in printing.

[fol. 24] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT ON APPEAL—Filed Jan. 9, 1932

To the Honorable James J. O'Connor, clerk:

You are hereby notified that the plaintiff in the above entitled cause, having prayed and been allowed an appeal to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, desires to file in said Court of Appeals a typewritten or manuscript transcript containing the following documents and proceedings in said cause, to-wit:

1. Petition—Omit the exhibits attached to the petition. They correspond to the following exhibits on the agreed statement of facts and appear in the bill of exceptions, to-wit:

Exhibit "A" is Exhibit "A" on the agreed statement of facts.

[fol. 25] Exhibit "B" is Exhibit "E" on the agreed statement of facts.

Exhibit "C" is Exhibit "F" on the agreed statement of facts.

Exhibit "D" is Exhibit "H" on the agreed statement of facts.

Exhibit "E" is Exhibit "B" on the agreed statement of facts.

2. Answer.

3. Bill of Exceptions.

Omit the following exhibits attached to the agreed statement of facts—Exhibit "C", Exhibit "D", Exhibit "G", Exhibit "L", Exhibit "M" and Exhibit "N". These exhibits are immaterial on this Appeal.

4. The Court's finding of facts and opinion, record entries of judgment, motion for new trial and order overruling same, order showing approval and filing of Bill of Exceptions.

5. Petition for Appeal.

6. Assignment of Errors.

7. Order granting appeal; order allowing time to file bond; bond, and order approving bond.

8. Citation and acceptance of service.

9. Præcipe for transcript and certificate of Clerk to transcript.

You are further notified that plaintiff elects to have transcript of the record printed under the supervision of the Clerk of said Court of Appeals, under its rules, and requests that you make and have filed in said Court of Appeals, said transcript herein requested, in accordance with the rules of said Court of Appeals.

Abraham Lowenhaupt, Spencer M. Thomas, Attorneys for Plaintiff.

Service of copy acknowledged this 9th day of January, 1932.

Claude M. Crooks, Attorney for Defendant.

[fol. 26] In United States District Court

Stipulation as to Exhibits and Portions Thereof to be Included in Transcript—Filed Jan. 18, 1932

It is stipulated by and between counsel for the plaintiff and counsel for the defendant in the above-entitled cause, as follows:

The statements hereinafter made concerning the contents of omitted exhibits or omitted parts thereof shall be taken in lieu of such exhibits or such parts thereof for the purpose of the record.

(1) Exhibits A, C, D, H, I and K to the Agreed Statement of Facts shall be copied in full as part of the transcript of the record in this case.

(2) Exhibit B to the Agreed Statement of Facts, being a copy of the claim for refund for the year 1919, need not be copied in full as part of the transcript of the record in this case. Only the following pages thereof, true copies of which are attached to this stipulation, need be copied into the transcript of the record, to-wit:

The first and second pages of said exhibit.

It is further stipulated that all the remaining pages of said exhibit are identical with the corresponding pages of the claim for refund for the year 1918, Exhibit A, and that the Exhibit A contained in the transcript of the record except the part corresponding to the two pages of Exhibit B to be copied above, shall be taken also as all the material part of Exhibit B.

(3) Exhibit E to the Agreed Statement of Facts need not be copied in full as part of the transcript of the record in this case. Only the following pages thereof, true copies of which are attached to this stipulation, need be copied into the transcript of the record, to-wit: The first, second and third pages thereof, and that part of the fourth page thereof preceding the subdivision "(C) Inventory Adjustment for 1917", also the signature at the end of the letter, and the affidavit.

(4) Exhibit F to the Agreed Statement of Facts need not be copied in full as a part of the transcript of the record in this case. Only the following pages thereof, true copies of which are attached to this stipulation, need be copied into the transcript of the record, to-wit: The first, second, third, fourth, fifth, and that part of the sixth page [fols. 27 & 28] thereof preceding the subdivision beginning "(3) Texas Bag & Fibre Company Purchase", also the signature at the end of the letter and the affidavit.

(5) Exhibit G to the Agreed Statement of Facts need not be copied as a part of the transcript of the record in this case. It is a letter from the Internal Revenue Agent in Charge at St. Louis, Missouri, transmitting his report to the Commissioner of Internal Revenue and is not material to this appeal.

(6) Exhibit L to the Agreed Statement of Facts need not be copied as a part of the transcript of the record in this case. It is a copy of plaintiff's tentative income and excess profits tax return for the year 1918 and is not material to this appeal.

(7) Exhibit M to the Agreed Statement of Facts need not be copied as a part of the transcript of the record in

this case. It is a copy of plaintiff's final income and excess profits tax return for the year 1918 and is not material to this appeal.

(8) Exhibit N to the Agreed Statement of Facts need not be copied as a part of the transcript of the record in this case. It is a copy of plaintiff's final income and excess profits tax return for the year 1919 and is not material to this appeal.

Spencer M. Thomas, Abraham Lowenhaupt, Attorney for Plaintiff. Louis H. Breuer, Claude M. Crooks, Asst. United States District Attorney.

[fols. 29 & 30]

EXHIBIT "A"

(Execute Separate Form for Each Tax Period)

Treasury Department
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U. S.
January 18, 1922

Important
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Claim For

..... Abatement of Tax Assessed

..... Credit Against Outstanding Assessments

....X ... Refund of Taxes Illegally Collected

..... Refund of Amounts Paid for Stamps Used in Error or Excess

Collector's Notation

District

Account number

Date received

State of Missouri }
City of St. Louis } ss:

Notice To Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit

Stamp here

Stamp here

.....
Collector of Internal Revenue

Type or Print

Bemis Bro. Bag Company
(Name of taxpayer or purchaser of stamps.)
601 South Fourth Street
(Residence—give street and number as well as city or town and State.)
St. Louis, Missouri
(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period			Year
1. Business in which engaged	From:	Jan.	1	1918
2. Character of assessment or tax	To:	Dec.	31	1918
(State for or upon what the tax was assessed or the stamps affixed.)				
3. Amount of assessment or stamps purchased				$6.046.728.28
4. Reduction of Tax Liability requested (Income and Profits Tax)				$1.270.907.97
5. Amount to be abated				$
6. Amount to be refunded (or such greater amount as is legally refundable)				$1.270.907.97
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) Mar. 15; Jun 15; Sept. 15 and Dec. 15, 1919.				
(If statement covers income tax liability, items 8–11, inclusive, Must be answered.)				
8. District in which return (if any) was filed 1st District Missouri				
9. District in which unpaid assessment appears None				
10. Amount of overpayment claimed as credit				$ None
11. Unpaid assessment against which credit is asked; period from to				$ None

Deponent verily believes that this application should be allowed for the following reasons:

.....

.....

[fol. 31] (Attach additional sheets if necessary.)

(Signed) Bemis Bro. Bag Company, J. S. Bemis, Vice-President.

Sworn to and subscribed before me this 12th day of January, 1924. My commission expires Nov. 15, 1927. C. F. Wassall, (Title:) Notary Public.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

The Excess Profits Tax and War Profits Tax against this company for the year 1918 should be assessed under the provisions of Section 327 and 328 of the Revenue Act of 1918.

The facts and argument in support of this claim are contained in a brief, duly verified, which has been filed with the Commissioner of Internal Revenue, in support of a claim for refund made in connection with the company's return for 1917 and the tax paid thereon. The facts and circumstances which entitle the company to assessment under said sections for 1917 obtained also in 1918. In order to simplify matters and avoid repetition, the brief filed with the claim for refund for 1917 (a copy of which brief is attached hereto) by reference thereto is made a part of this claim.

Estimating, from such advice as is available, that the tax of representative corporations was equal to 40% of their net income for the year 1918, the company has calculated its tax liability for said year, as follows:

Net income, as per amended return			$10,153,439.00	
Tax paid, as per amended return				$6,046,728.28
Estimated Tax Liability:				
Excess Profits & War Profits Taxes of representative concerns estimated at 40%			4,061,375.60	
Net income		10,153,439.00		
[fol. 32]				
Less:				
Interest on obligations of U. S.	46,737.32			
Profits:				
Taxes	4,061,375.60			
Exemption	2,000.00			
		4,110,112.92		
		6,043,326.08		
Tax at 12%			725,199.13	
			4,786,574.73	
Less income, war and excess profits taxes paid other countries			10,754.42	
				4,775,820.31
Amount to be refunded				1,270,907.97

In re Claim of Bemis Bro. Bag Company for Refund of Taxes for the Year 1917 Based Upon Right to Special Assessment

To the Honorable Commissioner of Internal Revenue, Washington, D. C.:

Bemis Bro. Bag Company has heretofore filed its claim for refund of taxes for the year 1917, based upon the right to assessment of its Excess Profits Taxes under Section 210 of the Revenue Act of 1917. It now desires to elaborate and present in detail the reasons why its Excess Profits Tax for said year should be so determined.

The subdivisions of the statement hereafter written are as follows

Outline

I. Reasons why the tax should be so determined and facts upon which such reasons are based:

(1) The Commissioner is unable to determine the invested capital as provided in Section 207 of the Revenue Act of 1917. Due to conservative accounting and mistaken analysis, the plant and machinery accounts do not disclose the cost or value of these items, in support of which statement we shall refer to a few items disclosed by the books concerning

[fol. 33] A. Plant Accounts—

(a) St. Louis Bag Factory.

(b) Bemis, Tennessee, Plant.

B. Brand Printing Plates and Equipment.

(2) A mixed aggregate of tangible and intangible property has been paid in for stock, and the Commissioner is unable to satisfactorily determine the respective values of the several classes of property at time of payment.

(3) The tax, if determined without benefit of Section 210, owing to abnormal conditions affecting the capital and income, would work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of Section 210 and the tax computed by reference to the representative corporations referred to in Section 210.

(a) The very considerable and valuable good-will of the Company has never been capitalized and no invested capital is allowed to the Company because thereof.

(b) A considerable part of the Company's business was done upon borrowed capital.

(c) Salaries paid to officers and employees holding stock were insufficient for the services rendered.

(d) Inventions and patents possessed by the Company, given to the Company, or paid for by the Company prior to 1917, are allowed no value as invested capital.

(e) The net income of the taxable year was in large part the realization in that year of the earnings of funds expended during previous years, but not capitalized. The net income of the taxable years was also largely due to the results of the activities of the preceding years.

(f) Conclusion.

II. The company's business.

III. Invested capital and income of preceding years.

IV. Profits from Government contracts.

V. Relief sought.

[fol. 34] Statement

The facts are hereafter stated in the order and under the subdivisions above written.

I. Reasons Why the Tax Should Be So Determined and the Facts Upon Which Such Reasons Are Based

(1) Invested capital cannot be determined as provided in Section 207.

A—Plant Accounts

The Company was incorporated on May 8, 1885. It now operates branches in the following cities:

Boston, Mass.—Purchasing Department and Sales Organization.

St. Louis, Mo.—Bag Factory, Cotton Mill.

Bemis, Tenn.—Cotton Mill, General Store.

Brooklyn, N. Y.—Bag Factory.

Houston, Tex.—Bag Factory.
Indianapolis, Ind.—Bag Factory, Bleachery, Cotton Mill, Machine Shop, Ink Factory.
Kansas City, Mo.—Bag Factory.
Memphis, Tenn.—Bag Factory.
Minneapolis, Minn.—Bag Factory.
New Orleans, La.—Bag Factory.
Omaha, Neb.—Bag Factory.
Peoria, Ill.—Paper Bag Factory, Paper Mill.
San Francisco, Cal.—Bag Factory.
Seattle, Wash.—Bag Factory.
Winnipeg, Canada—Bag Factory.

Some of the plants above listed or parts of them were owned prior to the formation of the Company. Others were operated in other localities and have been moved or reconstructed since the Company was formed. The number of branches has grown through the years since the organization of the Company.

In the early years no settled or clear line of demarcation between repairs and maintenance on the one hand and renewals or capital additions on the other hand was made; [fol. 35] the tendency of the officers of the company was at all times to be very conservative. Considerable expenditures in the nature of improvements and betterments were made, which should have been capitalized, but which were charged to current expense. This is evident from a comparison of the plans and the plant accounts.

The vouchers of those years are no longer in existence and the exact determination of amounts and items is impossible. But some items of considerable amount appear upon the ledgers and demonstrate the foregoing statement to be true.

The items that we have discovered are such as might properly have been capitalized, but the entries made which would have resulted in their capitalization were afterwards reversed by the officers of the Company. The first entries made representing some such expenditures were afterwards reversed and charged off. As illustrations, we mention the following items discovered upon a cursory examination of the accounts of two plants. In this examination it was impossible to determine anything before the year 1901 and all of the entries of this character that we have discovered were made prior to 1913.

The accounts to which we directed or attention for the purpose of illustrating the manner of accounting were those of the St. Louis Bag Factory and the Bemis, Tennessee, Cotton Mills branches. We selected these as representative of the various endeavors of the Company. A considerable part of the printing equipment has never been capitalized, and it also offers a striking example of the Company's conservative accounting methods.

(a) St. Louis Bag Factory

Item 1. In 1907 an account was opened called "St. Louis Factory Building Account." The items charged to it consist of sand and gravel, hardware, purchases from a Rope and Cable Company and various items of this character. On November 30, 1907, the original decision to capitalize these items was reversed. The total then charged to this account—$2,555.53—was charged to profit and loss. Thereafter no such account appears upon the books and further items of this character on construction then under way were all charged to expense.

Item 2. On November 30, 1909, the following entry appears on the journal:

[fol. 36] Profit and Loss, Dr	$254,263.58
Real Estate and Buildings, Reserve, Cr	219,853.58
Machinery and Fixture, Reserve, Cr	34,410.00

The effect of this entry was to reduce the fixed assets account $254,263.58.

(b) Bemis, Tennessee, Cotton Mills

Item 1. In April, 1900, the Jackson Fibre Co. was incorporated under the laws of Tennessee, by some of the principal stockholders of Bemis Bro. Bag Co. The stock stoood in the name of the officers of the Bemis Bro. Bag Co. The land upon which the plant and village are built was given to the Company by Madison County, Tennessee. The community is made up entirely of the Company's employees and their dependents. Mr. J. M. Bemis was much interested in the development and welfare of the community, and from time to time made substantial gifts from his personal funds, particularly in the Church, Schools and Y. M. C. A. building and furnishings, amounting to $24,942.42, was a gift from

Mr. J. M. Bemis, and one-half was paid by the Company and charged to "expense".

Item 2. An account called "General Expense of Construction" was charged to "profit and loss". It was originally planned to capitalize it, but on November 30, 1901, $16,997.42 was charged off to reduce the permanent investment to $710,000. On January 15, 1902, "Profit and Loss" was debited and "Expense of Construction" was credited with $16,601.92, and in February, 1902, this account was closed out to "Profit and Loss."

Item 3. An account called "Starting Expense" was maintained through May, June and July of 1901 and was then charged to Profit and Loss, and thereafter all the "Starting Expense" was charged to Profit and Loss.

The instances cited above are demonstrative of the accounting principles applied throughout all the plants. It was the custom of the Company to capitalize only the direct cost of labor and materials, and thereafter, costs of additions and betterments were usually considered "expense". The aggregate of such items considering all the plants is a very serious total.

[fol. 37] B—Brand Printing Plates

An outstanding instance of the conservative methods applied by the Company in the construction and maintenance of its accounts was discovered in its equipment. The Company makes bags upon which it prints the user's brands, and it is reputed to have in its printing press equipment, a larger daily impression capacity than the largest newspaper in the United States, not excepting any one of the New York or Chicago daily papers.

The brands are printed upon the bags with metal printing plates. To make this plate it is necessary first to make a drawing or photograph of the brand, from which a metal pattern is made. A matrix is then made from the pattern and the printing plate is made from the matrix. The printing plate in time wears out, whereupon it is melted down and a new one made from the matrix, or if the matrix has become mutilated, a new matrix is made from the pattern. (If the brand is printed in several colors, it will require several plates to print a brand. A set consists of the copy,

the pattern or patterns, matrix or matrices and the printing plates or plate necessary to print the brand.)

Each element of a set is indexed. The copies are filed in filing cabinets, the matrices are filed in large metal cases; the patterns and printing plates are kept in fireproof vaults.

This equipment is the most necessary part of the Company's business. Its buildings and other equipment could be easily duplicated, but if its printing sets were destroyed it would require years to duplicate them and the Company in the meanwhile would have to abandon substantially all of its business. These plates have been acquired through the years of the Company's business and at an enormous cost of endeavor, labor and money, all of which has been charged to expense. (They are the [concret-] embodiment of the Company's business career.)

The engineers of the Company, from the records of the Company, have prepared a calculation showing the amount which it would have cost in 1916 to produce the printing plate equipment possessed by the Company. This calculation is based on the plates possessed on December 31, 1922, because the Company's records in 1916 did not show the date of the last use of any plate. Due allowance has been made, however, for the normal growth of the number of the plates since 1916. The value of the plates possessed on December 31, 1916, so calculated, is $851,375.50.

[fol. 38] This calculation has been prepared upon the most conservative basis. The average costs used for the various items, copies, engraved plates, matrices and printing plates were determined by the engineers from the exact calculations of the minimum time and material required for the making of the average copy, engraved plate, matrix and printing plate. An exact calculation of the cost of 200 sets taken at random showed a much larger average cost. This calculation was made to check the engineer's estimates. The lower cost calculated by the engineers was used and the cost so determined was reduced to 1916 cost.

Exhibit I, attached hereto, sets forth the details of this calculation based upon the engineers' calculations of cost and value of the average unit. Exhibit II. is the exact cost of 200 sets taken as they stand in the files, without discrimination, which shows a much higher average cost and proves that the engineers' calculation is conservative.

The calculation of bare labor and material value does not disclose the real cost or value of this asset. This asset also represents all of the solicitation and advertising expense, the advantage and value of possession and the good-will accumulation of years. By possessing the plates, etc., for printing with dispatch the brands of its customers, the Company is able to give an unexcelled service to the trade, and it is thereby largely assured of a continuation of patronage.

(2) A Mixed Aggregate of Tangible and Intangible Property Has Been Paid in for Stock and the Commissioner is Unable to Satisfactorily Determine the Respective Values of the Several Classes of Property at the Time of Payment.

A. Original Incorporation.—The Company was incorporated on May 8, 1885, with an authorized capital stock of $350,000 and took over a going business theretofore operated by Judson M. Bemis and Stephen A. Bemis, a partnership under the firm name of Bemis Bro. & Company. This business was originally established by Judson M. Bemis in the year 1858, and the partnership with Stephen A. Bemis was formed in about the year 1867.

At the date of the incorporation of the Company a very profitable business had already been developed, the annual sales approximating $1,500,000. A bag factory and cotton mill were operated in St. Louis and branches were maintained at Boston and Minneapolis. No balance sheet as of the date of incorporation is now available, but on November [fol. 39] 30, 1885, six months after the incorporation, the financial position as set out in a statement prepared at that time was as follows:

Balance Sheet as at November 30, 1885

Assets

Cash	$14,550.13	
Merchandise Inventory	171,365.41	
Bills Receivable	8,231.72	
Accounts Receivable	147,011.60	
B. B. B. Co. Minneapolis	112,900.92	
Due from Stockholders	19,408.86	
Doubtful accounts	596.74	$474,065.28
Real Estate and Buildings	$47,500.00	
Fixtures Account	65,000.00	
Stable Account	3,217.72	
Total Fixed Assets		115,717.72
Total Assets		$589,783.10

Liabilities

Bills Payable	$93,339.30	
Accounts Payable	27,434.88	
B. B. B. Company, Boston	67,523.14	
Home Cotton Mill	12,035.66	
Due Stockholders	2,071.37	
		202,404.35
Capital stock		350,000.00
Profit		37,378.75
Total Liabilities		$589,783.10

*NOTE.—On December 15, 1885, the Profit and Loss Account was credited $23,022.11 as Profit of B. B. B. Company, Minneapolis, and after some further adjustments the Profit and Loss Account to November 30, 1885 is shown as $57,025.69.

We attach hereto (Exhibit III) a copy of the minutes of the first stockholders' meeting held in St. Louis, Missouri, on June 8, 1885. From these minutes it will be seen that all the property of the partnership was transferred, including the good-will, and that the sole consideration consisted of $350,000.00 in capital stock of the new company.

At the date of incorporation the co-partnership had already esablished a splendid reputation and had developed a very valuable good-will. The direct cost of the establishment of this good-will is impossible at this to determine, as the expenditures were in a large measure indirect. The [fol. 40] partners were young men when they started the business, and applied themselves closely and continuously to it, drawing only nominal wages or salaries.

No reliable record is now available of the earnings in the years prior to incorporation of the Company, but the following statement of the earnings immediately after the incorporation of the Company will afford some idea of the extent to which the business had been developed:

Year ending	Net earnings	Capital and surplus
Nov. 30, 1885 (6 months)	$57,025.69	$350,000.00
Nov. 30, 1886	65,513.60	407,000.00
Nov. 30, 1887	108,009.46	448,500.00
Nov. 30, 1888	234,358.94	549,000.00
Nov. 30, 1889	129,224.12	702,500.00
Average per annum	$118,826.36	$491,400.00

From the foregoing figures it will be seen that the average annual income amounted to 24% of the tangible assets employed and that, after setting aside 7% of the tangible

assets, there remained annual earnings of $84,426 applicable to the intangible values, thus indicating a good-will value of from $600,000 to $850,000. Such a valuation would not be unreasonable, as the business had already been in existence for a period of 27 years.

Upon the incorporation of the Company the assets transferred clearly covered all assets, both tangible and intangible, and it is so stated in the minutes of the stockholders. But no specific value was placed upon the intangible assets acquired. All the stock of the new company was issued to the partners and no outside capital was interested, so that the question of appropriate value for the good-will will not arise. Moreover, the stock continued to be closely held in the families of the incorporators and there was no reason at any time to place upon the books of the Company or in its balance sheet any valuation for the intangible assets.

If the value of the respective kinds of property could be satisfactorily determined this Company would be entitled to additional invested capital under the provisions of Article 57 of Regulations 44 and T. B. R. 49 and A. R. R. 307. But in this case the value of the good will acquired at the organization was in excess of the total capital stock then issued and no proper allocation of the value of the property paid in for capital stock can be made. As stated in A. R. R. [fol. 41] 307, that fact entitled this Company to assessment of its taxes under Section 210.

B. Subsequent Purchases.—Since the organization of the corporation various companies have been purchased by the Bemis Bro. Bag Company. No refinancing was attempted and no good-will value was set up on the books from time to time as different plants were purchased. Although these were going and money-making concerns, they were purchased and taken over at this book value, which did not include any value for their good-will. The stockholders of all the companies purchased, except the cotton mill, hereafter described as part of the purchase from Brower & Love Bros. Company, were the principal stockholders of Bemis Bro. Bag Co. and for that reason they were indifferent to the stated purchase price. The entire assets of such going concerns as were acquired through purchase were as follows:

(1) Gulf Bag Company, Ltd., with bag factories at New Orleans and San Francisco, was purchased by Bemis Bro.

Bag Company in 1900, at its book value; that is to say $193,400.

(2) Home Cotton Mills Company, with a cotton mill at St. Louis, Mo., was purchased by Bemis Bro. Bag Company in 1902, at its book value; that is to say $250,000.

(3) Jackson Fibre Company, with a cotton mill and modern cotton mill village at Bemis, Tenn., was purchased by Bemis Bro. Bag Company in 1910, at its book value; that is to say $710,000.

(4) Brower & Love Bros. Company, with a cotton mill and bleachery at Indianapolis, Ind., was purchased by Bemis Bro. Bag Company in 1911, at its book value; that is to say $500,000.

(5) Texas Bag & Fibre Company, with a bag factory at Houston Texas was purchased by Bemis Bro. Bag Company in 1917, for $500,000 which was $56,659.92 less than its book value.

Upon any proper account of the purchases, mergers and consolidations above stated, value and cost should be assigned to the good-will of the companies acquired. The absence of detailed records of these companies at this date makes the exact calculation of good-will value almost impossible. But the dividend records of those companies indicate that their good-will was worth practically as much as their physical assets.

[fol. 42] (3) The Taxes, if Determined Without the Benefit of Section 210, Owing to Abnormal Conditions Affecting the Capital and Income of the Corporation, Would Work Upon the Corporation Exceptional Hardship Evidenced by Gross Disproportion Between the Taxes Computed Without the Benefit of Section 210 and the Taxes Computed by Reference to the Representative Corporations Referred to in Section 210.

As previously stated, the stock of the Company has largely been held by the officers of the Company and their immediate families. This fact has resulted in such arrangements of the capital of the Company and such disregard as to whether the profits were received as dividends, or as payments for items which would constitute Company ex-

pense, that the invested capital upon the statutory basis is abnormally low and the statutory income subject to tax is abnormally high. As substantiation of this statement we point to the following particular facts.

(a) Good Will.—There has never been any reorganization of this Company. In the years prior to 1917 the Company developed a very large and substantial good-will. We have heretofore stated the invested capital and net profits of the Company for the years just succeeding its organization. We are hereafter stating invested capital and the profits of the Company for the years 1902 up to and including the year 1916. In the whole life of the Company there was never a year in which it suffered a loss except the years 1914 and 1920, the reason for which is hereafter stated. The figures show the substantial good-will value possessed by the Company.

We venture that not another organization in the United States in the year 1917 had made so substantial a showing of good-will value through so many successive years without reorganization and without the capitalization of its intangible assets, in consequence of which it is deprived of the benefits of this factor in its Invested Capital figures for federal tax purposes.

The good-will possessed by the Company was established at enormous expense. The making of bags for any user involves a very substantial preparation. After the business is secured and his bag designs have been arranged and submitted, plates must be made of his brand or trade-mark. Thereafter the possession of this data and the information is a great advantage in securing future business. The Company possessing the design of his bag, the knowledge and [fol. 43] record of the exact capacity and size, the color designs and plates for printing, can, with this knowledge and use of the records produce the finished bag for him upon very short notice; whereas, any other person would have to prepare all of this anticipatory work and would require a great deal of time. The Company frequently submits designs, estimates and samples upon which it may not secure any business at the time, but which business it may secure at some later date.

Practically all of the Company's customers served in the year 1917 were secured prior to that year, and all of the

expenses of preparation was incurred and charged to the profits of the year preceding.

Branches have been established in order to give better service and to secure economy and efficiency of operations. At various times the Company has made surveys of localities with the view to establishing of branches. Such surveys always involve considerable expense. Sometimes a plant has been located; at other times no satisfactory location has been found. On several occasions plants located in some locality have been found not advantageous and have been abandoned.

The list of locations of the Company's branches has been heretofore stated. It will be noted that branches are located throughout the United States, so that service may be rendered quickly and promptly and at the smallest expense in every part of the United States. Among them are listed the plants where the Company manufactures a large part of its raw material.

The branch at Bemis, Tennessee, and the Home Cotton Mills at St. Louis and the branch at Indianapolis manufacture a large part of the cotton goods used by the Company in making bags. The Company has a machine shop in Indianapolis at which it manufactures a large part of its machinery used in its various factories, and it operates a paper mill at Peoria, Illinois, which produces a large part of the paper used in its product. A considerable part of the sewing thread used in the making of bags, as well as the ink used for printing bags, is manufactured by the Company. In addition, the Angus Company, Ltd., of Calcutta, India, is largely owned by the officers of this Company. The Angus Company operates jute mills in India and exports its product to the United States.

No branch has been established without a most scientific and exhaustive examination into the location and into the [fol. 44] fitness of the location. The location of a plant by this Company is a matter of very serious and careful survey and examination by the officers and engineers of the company. The staff for the management must be secured and frequently carried upon the payroll prior to the operation of a new branch. The expense of surveying locations, determination of railroad outlets, transportation costs and service, labor conditions, together with cost of organizing

the force for the operation of all of the plants of the Company is an uncalculable aggregate amount.

When a new factory, such as a cotton mill, a bag factory, a paper mill, etc., is to be located and started, the expense of investigation with regard to the location, the expense of securing the necessary experienced managers, superintendents, and factory employees, the cost of unavoidable errors in judgment in employing persons unsuited to the work during the early months of operation, of necessity amounts to a very considerable sum in the case of each plant or factory located. All of the expenditures made on account of the above named conditions have been in all cases charged to expense; no such items of expenditure have been capitalized.

These are the elements incident to establishing a going business, growing from the mere manufacture of bags—that is, the sewing of bags—in one location, into the manufacture of bags in fifteen different locations throughout the United States and in Canada, including the manufacture of cotton goods and burlap and machinery and thread and ink.

All of this preparative expense was taken out of the profits of the years prior to 1917, so that by 1917 this great organization was ready. Only one new plant has been established since 1917, to-wit, the plant at Brooklyn, New York, opened in 1920.

As stated above, the stock of the Angus Company, Ltd., of Calcutta, was largely owned by the stockholders of this Company. Its prime purpose is to supply burlap cloth to this Company. By reason of that fact it has sought no other trade or custom, and by reason of that fact in the year 1917 it held to the performance of contracts with this Company in many instances at prices less than the prevailing market prices of such goods at the time of the delivery. The possession of this source of supply enabled the company to operate continuously during all the war years, because it had a reliable source of supply.

[fol. 45] As of January 1, 1917, the Company had had a corporate existence of 32 years and the business had been established for a period of 60 years. During the whole of this period there was at no time any reorganization of refinancing, in any form, except the incorporation of the Company in 1885. At no time during this entire period of 60 years was any valuation placed in the Company's records

to cover these valuable intangible assets and therefore, under the strict interpretation of the Revenue Act, the Company is not permitted to take into its invested capital any values whatever for such good will.

The Company's business is the manufacture of cotton and jute bags, and, as previously stated, it operates 20 branches, situated at various points throughout the United States and in Canada. The name of the Company is of national repute and its trade-mark, "The Cat in the Bag," is known in all industries where bags are used. Its business reached in the year 1917 sales of over fifty-seven million dollars and a large portion of this tremendous business was due to the momentum accumulated during the long period of the Company's history.

The total sales and statutory invested capital for the various tax years are as follows:

Year	Sales	Statutory invested capital	Turnover of capital per annum
1917	$57,248,000	$16,546,426	3.5 times
1918	94,993,000	21,863,524	4.4 times
1919	74,389,000	25,644,428	2.9 times

From the foregoing statement it will be noted that the Company's total capital (plant equipment, printing and all other assests) is turned over on an average of 3.6 times per annum.

This result is more apparent than real for the reason, as previously stated, that so much of the Company's capital is not disclosed. As further illustrating the disproportion between the business of the Company and its statutory invested capital, we set out the following figures of sales, expenses and income:

		Net Taxable Profits		Percent of profits to statutory invested capital
Year	Net sales	Amount	% to sales	
1917	$57,248,000	$9,724,880	17.0%	58.1%
1918	94,993,000	10,153,430	10.6	46.4
1919	74,389,000	9,593,765	12.9	37.4

[fol. 46] (b) Borrowed Money—The Company's statutory invested capital for the year 1917 was $16,546,426.00. The average borrowed capital for that year was $10,244,000.00. Included in the borrowings is an average indebtedness to stockholders amounting to $1,700,000.00. The indebtedness to stockholders at the close of the various years was as follows:

As of December 31, 1916	$2,082,342.83
As of December 31, 1917	1,697,902.57
As of December 31, 1918	1,587,571.07
As of December 31, 1919	1,407,352.20

While such balances bore interest at a nominal rate of 5% and *the* therefore properly regarded as money borrowed, and as such not to be taken into invested capital, the circumstances surrounding these particular items are such as to make them in effect paid-in surplus.

The relative invested capital and total borrowed capital for various tax years was as follows:

Year	Statutory invested capital	Borrowed capital
1917	$16,546,426	$10,244,000
1918	21,863,524	12,530,000
1919	25,644,428	3,618,000

The stockholders and officers not only loaned their personal funds to the Company upon which its operations were conducted, but they also arranged for its very large credit outside. The Company's credit prior to the year 1917 had so expanded and so grown that it was practically unlimited. Such great reliance could be placed upon its credit, maintained consistently by the integrity and responsibility of its officers, that it felt no necessity for a greater investment of funds in the stock of the Company.

(c) Salaries.—A substantial part of the stock of the Company is owned by the officers and members of their families, but various responsible employees are also substantial stockholders. The dividends paid by the Company upon such stock have always been large and the officers and employees have served the Company and looked to the return upon this stock for their compensation rather than to the salaries or wages paid to them.

The amounts of the salaries of officers and their relationship to the sales of the Company in the various tax years is as follows:

[fol. 47] Year	Total sales	Salaries paid officers	Percentage of salaries to sales
1917	57,248,000	81,225	4.14%
1918	94,993,000	110,520	0.11%
1919	74,389,000	157,520	0.21%

It will be noted that on an average during these three years the total salaries paid to officers aggregate only one-seventh of 1% of the sales. Wages paid to other employees who were substantial stockholders were relatively as insufficient to the value of their services.

(d) Patents and Inventions.—In the years of its operation, those connected with the Company have from time to time made various inventions, which the Company was using in the taxable year 1917, and which were the source of a considerable part of its saving. Such inventions made by those connected with the Company were given to the Company in the years preceding 1917, and such amounts as were paid to employees were charged to the expense of those years. Their use is thoroughly and skillfully protected so that competitors may not acquire them. As outstanding instances we mention the following:

(1) High-speed Hemming Machines.—Certain of the customers of the Bemis Bro. Bag Company require that a folded-over hem be placed around the mouths of the bags furnished them. The usual method of doing this work was to hem the bags on power sewing machines as a separate operation.

In 1913, the Bemis Bro. Bag Company developed a high-speed sewing machine in combination with guiding rolls, through the use of which it was possible to combine the operation of hemming with the operation of web printing described elsewhere.

The outstanding feature of this hemming machine is the very great speed at which it functions. In order not to reduce the production of the printing press it must hem the cloth as rapidly as the printing press can print it. To do this, it functions at approximately twice the speed of sewing machines available to other concerns in the same line of business. This special sewing machanism has also enabled the Bemis Bro. Bag Company to realize a saving in the amount of sewing thread consumed in the hemming operation.

To illustrate the savings effected through the use of this machine, the following figures are submitted:

[fol. 48] Bags processed on machines of this type during the year 1922	17,078,000
Aggregate saving in labor cost through the use of this mechanism on the above bags	$22,426.00
Brought forward	$22,426.00
Aggregate saving in sewing thread through the use of these machines	3,098.00
Total	$25,524.00

The saving realized through the use of this invention would justify a value of at least $250,000.00. As a matter of fact only the cost of making the various physical mechanism now in use has been capitalized; even the expense of experimentation, drafting, and preliminary models and designs was charged off.

(2) Web Printing Device.—Many of the customers of the Bemis Bro. Bag Company specify that bags shall be printed on both sides. The usual method of doing this work is to feed the bags through the printing press twice, first printing one side, and then the other. This involves a double labor cost.

In the period between 1905 and 1909 the Bemis Bro. Bag Company developed a mechanism for taking the required amount of cloth for a bag from a roll, cutting it, printing both sides simultaneously and folding it ready to be sewed into a bag, all in one operation. This device has been in use for some years.

To illustrate the savings realized by the Bemis Bro. Bag Company through the use of these machines, the following figures are submitted:

Number of bags printed on both sides in one operation during the year 1922 by means of the B. B. B. Co.'s web printing attachment	37,708,000
Total saving in wages during the year 1922 through the use of this machine	33,241.00

The saving realized through the use of these machines indicate a value to this Company of at least $330,000.

(3) The foregoing are, we believe, sufficient illustrations of the valuable inventions and devices possessed by the

[fol. 49] Company. There are other devices and inventions of great value. The list and description of each one of them would extend this brief beyond the proper limits. The effect of all of them in this Company's business is so great that to a considerable extent they account for the apparent abnormality of its profits.

(e) The net income of the taxable year was in large part the realization in that year of the earnings of funds expended during the previous years but not capitalized. The net income of the taxable year was also largely due to the results of the activities of preceding years.

The facts supporting this subdivision are essentially those above stated. Summarized, they are as follows:

(1) A large part of the cost of construction, betterment and repair of plants and equipment and the total cost of its printing plates was charged to expense in the years prior to 1917.

(2) Uncapitalized good-will acquired for stock at the formation of the company, the good-will of these going and money-making concerns subsequently purchased, and the very large good-will and going business developed prior to 1917 through operations of the Company and through methods and procedures some of which were very expensive and all of the cost of which was charged to expense, are the source of much of the Company's business.

(3) The development through the years of a large and impressive array of clients and customers, whose custom was held by reason of prompt and efficient service of those years, and also by reason of the possibility of better and quicker service than any competitor could offer because of the possession of the plates for the printing of their brands upon their goods enabled the Company to secure a very large part of its business for the year 1917 at substantially no selling expense.

(4) The improvement of methods and the discovery of devices at large expense, by which not only was the product improved, but large savings were effected in manufacturing through speeding up the operations of machinery and the substitution of machines for hand work.

(5) The location arrangement, starting and development of branches throughout the United States, the development [fol. 50] of sources of supplies in the years prior to 1917 made the successful operations of that year possible.

(f) Conclusion.—All of the facts above stated under the subdivision entitled "Invested Capital cannot be determined as provided in Section 207," are partly responsible for the abnormally high profits shown by the Company. They result in insufficient depreciation deductions because the capital accounts are not properly disclosed whereby the income is made larger than the actual taxable income of the Company. These with the facts heretofore recited in this subdivision are some of the more important reasons which make the relations of income to invested Capital abnormal.

The abnormality of these things appears best in the results of the Company's operations. The abnormality is all internal and hidden and, just as the exact character and nature of a disease may be discovered by the external appearances, so in this case the external appearances are demonstrative of the existence of the facts above recited.

An examination of the plants will demonstrate to anyone that they were never built for the amount of charges to the accounts on the books. The very large showing of profits constantly coming from this business for so many years—profits which were earned when no abnormal conditions existed and when profits could only be earned in the ordinary operations of the business in normal competition with others—demonstrate that there was employed in this business capital in addition to that shown by the books. And the conservative disposition of the founders of this business with the opportunities offered by the exceedingly large profits of the Company for the indulgence of this conservatism shows just how from year to year from its beginning, capital expenditures were lost in expense until the aggregate of all of them is appalling and the application of this tax upon the statutory basis makes the result confiscatory.

II—The Company's Business

The Company operates cotton mills wherein it produces cotton goods to be used by it in its bag factories. It manu-

factures cotton and burlap bags. These bags are sewed, and in most cases, printed with the users' brands. It manufactures a large part of its machinery equipment, and it also manufactures most of the printing ink used, and a considerable part of the thread with which the bags are sewed.

[fol. 51] III—Capital and Income of Preceding Years

The invested capital so far as it is disclosed by the books and the net income of the Company for each year since 1901 has been as follows:

	Capital and surplus at beginning	Earnings
Nov. 29, 1902	3,410,618.00	532,588.00
Nov. 29, 1903	3,736,832.00	653,514.00
Nov. 29, 1904	4,280,208.00	657,642.00
Nov. 29, 1905	5,622,592.00	1,050,632.00
Nov. 29, 1906	7,028,604.00	2,008,769.00
Nov. 29, 1907	7,651,233.00	1,479,649.00
Nov. 29, 1908	7,967,130.00	978,427.00
Nov. 29, 1909	9,161,294.00	943,700.94
Dec. 31, 1910	10,126,821.00	1,319,214.00
Dec. 31, 1911	10,356,230.00	1,058,456.50
Dec. 31, 1912	12,742,605.00	3,224,069.38
Dec. 31, 1913	13,061,886.00	1,936,721.49
Dec. 31, 1914	11,727,033.00 loss	102,862.99
Dec. 31, 1915	14,430,695.00	4,165,186.29
Dec. 31, 1916	17,054,484.00	4,111,789.79

The loss of 1914 was in large part due to the abnormal decline of values in this year.

IV—Government Contract Profits

The Company had no gains, profits or other income received on a cost-plus basis from Government contracts. It had no such contracts.

V—Relief Sought

Relying upon the sufficiency of the facts above recited to entitle it to the assessment of its Excess Profits Tax liability under the provisions of Section 210 of the Revenue Act of 1917, Bemis Bro. Bag Company has heretofore presented a claim for refund for the year 1917. We present this statement to you now and ask that at your earliest convenience you grant us a conference in connection there-

with, that insofar as possible the facts above recited be fully developed.

Respectfully submitted.
Jamison & Thomas, Lowenhaupt & Waite, Attorneys for Bemis Bro. Bag Co.

[fol. 52] STATE OF MISSOURI,
City of St. Louis, ss:

Judson S. Bemis, being duly sworn, deposes and says that he is Vice-President of the Bemis Bro. Bag Company, in whose behalf the foregoing statement is submitted; that he is familiar with the contents thereof, and that the facts stated therein are, to the best of his knowledge and belief, true and correct.

Judson S. Bemis.

Sworn to and subscribed before me this 12th day of January, 1924. C. F. Wassall, Notary Public. (Seal.)

[fols. 53 & 54]

EXHIBIT "B"

Treasury Department
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U. S.
January 18, 1922

(Execute Separate Form for Each Tax Period)
Claim For

Collector's Notation

District

Account number

Date received

Important
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

..... Abatement of Tax Assessed

..... Credit Against Outstanding Assessments

....X. ... Refund of Taxes Illegally Collected

..... Refund of Amounts Paid for Stamps Used in Error or Excess

Date received by Administrative Unit

State of Missouri }
City of St. Louis } ss:

Notice To Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

Stamp here

Stamp here

.....
Collector of Internal Revenue

Type or Print

Bemis Bro. Bag Company
(Name of taxpayer or purchaser of stamps.)
601 South Fourth Street
(Residence—give street and number as well as city or town and State.)
St. Louis, Missouri
(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

		Period		Year
1. Business in which engaged	From:	Jan.	1	1919
2. Character of assessment or tax	To:	Dec.	31	1919
(State for or upon what the tax was assessed or the stamps affixed.)				
3. Amount of assessment or stamps purchased				$2,999,754.82
4. Reduction of Tax Liability requested (Income and Profits Tax)				$ 606,546.31
5. Amount to be abated				$ None
6. Amount to be refunded (or such greater amount as is legally refundable)				$ 606,546.31
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) Mar. 15, 1920, June 15, 1920, Sept. 15, 1920.				
(If statement covers income tax liability, items 8–11, inclusive, must be answered.)				
8. District in which return (if any) was filed				
9. District in which unpaid assessment appears None				
10. Amount of overpayment claimed as credit				$ None
11. Unpaid assessment against which credit is asked; period from ..... to				$ None

Deponent verily believes that this application should be allowed for the following reasons:

.....

.....

[fol. 55] (Attach additional sheets if necessary)

(Signed) Bemis Bro. Bag Company. Judson S. Bemis, Vice-President.

Sworn to and subscribed before me this 10th day of December, 1924. Commission expires March 26, 1928. R. C. Knaup, (Title:) Notary Public.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

The Excess Profits Tax and War Profits Tax against this company for the year 1919 should be assessed under the provisions of Section 327 and 328 of the Revenue Act of 1918.

The facts and argument in support of this claim are contained in a brief duly verified, which has been filed with the Commissioner of Internal Revenue in support of a claim for refund made in connection with the company's return for 1917 and the tax paid thereon. The facts and circumstances which entitle the company to assessment under said Sections for 1917 obtained also in 1919. In order to simplify matters and avoid repetition, the brief filed with the claim for refund for 1917 (a copy of which brief is attached hereto), by reference thereto, is made a part of this claim.

Estimating from such advice as is available, that the tax of representative corporations was equal to 18 per cent of their net income for the year 1919, the company has calculated its tax liability for said year as follows:

Net income as per amended return		9,593,765.26	
Tax paid as per amended return			2,999,754.82
Estimated Tax Liability:			
Excess Profits & War Profits Taxes of representative corporations, estimated at 18%		1,726,877.74	
Net income		9,593,765.26	
[fol. 56]			
Less:			
Interest on obligations of U. S.	49,284.17		
Profits Taxes	1,726,877.74		
Exemption	2,000.00	1,778,161.91	
	1,778,161.91	7,815,603.35	
Tax at 10 per cent		781,560.33	
		2,508,438.07	
Less income, war and excess profits taxes paid to foreign countries		115,229.56	
			2,393,208.51
Amount to be refunded			$606,546.31

Respectfully submitted.

Jamison & Thomas, Lowenhaupt & Waite, Attorneys for Bemis Bro. Bag. Co.

STATE OF MISSOURI,
City of St. Louis, ss:

Judson S. Bemis, being duly sworn, deposes and says that he is Vice-President of the Bemis Bro. Bag Company, in whose behalf the foregoing statement is submitted; that he is familiar with the contents thereof, and that the facts stated therein are, to the best of his knowledge and belief, true and correct.

Judson S. Bemis.

Sworn to and subscribed before me this 10th day of Dec., 1924. My commission expires Nov. 16, 1923. C. F. Wassall, Notary Public, within and for the City of St. Louis, Mo. (Seal.)

[fol. 57] EXHIBIT "C"

Treasury Department, Washington

IT:E:SM. RSW-B-28462-6

October 30, 1926.

Bemis Brother Bag Company, 601 South 4th Street, St. Louis, Missouri.

SIRS: Your claim for the refund of $606,546.31 income and profits tax for 1919 has been examined.

Your claim is based upon your application for assessment of your profits tax under the provisions of Section 328 of the Revenue Act of 1918.

You are advised that after careful consideration and review your application under the provisions of Section 327 of the Revenue Act of 1918 has been denied for the reason that the evidence presented fails to establish that your invested capital or net income is affected by abnormal conditions which would justify the Bureau in computing your tax under the provisions of Section 328 of the above-mentioned Act.

In accordance with the above conclusions your claim for refund will be rejected in full.

The Collector of Internal Revenue for your district will be officially notified of the rejection at the expiration of thirty days from the date of this letter.

A copy of this letter has been forwarded to your representative, Richard S. Doyle, 820 Investment Building, Washington, D. C.

Respectfully, (Sgd.) C. R. Nash, Assistant to the Commissioner.

[fol. 58] EXHIBIT "D"

Treasury Department, Washington

IT:E:SM. RSW-10196. A-14502-6

Nov. 27, 1926.

Bemis Brother Bag Company, St. Louis, Missouri.

SIRS: Reference is made to your income and profits tax returns for the calendar years 1917 and 1918.

After careful consideration and review, your application under the provisions of Section 210 and 327 of the Revenue Acts of 1917 and 1918 for assessment of your profits tax as prescribed in Sections 210 and 328 of the above-mentioned Acts has been denied inasmuch as the audit disclosed no exceptional hardship evidenced by gross disproportion between the tax computed by reference to representative concerns specified in Sections 210 and 328.

In accordance with the above conclusions, your claims for refund of $1,770,104.23 and $35,355.79 for 1917 and $1,270,907.97 for 1918 will be rejected in full.

The Collector of Internal Revenue for your district will be officially notified of the rejection.

A copy of this letter has been furnished your authorized representatives, Lowenhaupt & Waite, Suite 928-932 Planters Building, St. Louis, Missouri.

Respectfully, (Signed) C. R. Nash, Assistant to the Commissioner.

tcl-1.

EXHIBIT "E"

December Thirteenth, 1926.

Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR:

Reference: Bemis Bro. Bag Co., 601 S. Fourth Street, St. Louis, Missouri.
[fol. 59] Incorporated under the laws of the State of Missouri.
Your letters of October 30, 1926 and November 27, 1926.
Symbols: IT:E:SM-RSW-10196-A-14502-6; also B28462-6.
Years: 1917, 1918 and 1919.
Denial of claims for refund.

The Bemis Bro. Bag Company received the letters above described advising it that its claim for assessment of its excess profits taxes for the year- 1917, 1918 and 1919, under the provisions of Sections 210 and 327 of the Revenue Acts of 1917 and 1918 has been denied, "inasmuch as the audit (for 1917 and 1918) disclosed no exceptional hardship evidenced by gross disproportion between the tax computed by reference to representative corporations specified in sections 210 and 328" and as to 1919 for the assigned reason that the "evidence presented fails to establish that the Company's invested capital or net income is affected by abnormal conditions which would justify the Bureau in computing its tax under the provisions of Section 328". We protest against the rejection of said claims for refund for the following reasons:

(a) The excess profits tax against the Company for the year 1917 should be determined under Section 210 of the Revenue Act of 1917 and the excess profits and war profits taxes for the years 1918 and 1919 should be determined under section 328 of the Revenue Act of 1918. The denial of said right must be based upon the use of improper comparatives as representative.

(b) If the assessment of the excess profits taxes against the Company in the matter claimed in the above subdivision is denied, then the items heretofore presented which have been improperly eliminated from invested capital should be

restored to invested capital and the excess profits tax recalculated on that basis.

(c) Claim for refund of $35,355.79, taxes paid for the year 1917, should be allowed in part in any event.

Facts

(a) Special Assessment. We have heretofore presented the facts entitling the Company to assessment of its taxes in this manner. We believe that the facts presented are ample. They show the following: A mixed aggregate of tangible and intangible properties was acquired at the or- [fol. 60] ganization of the Company for its capital stock. No intangibles were set upon the books of the Company or appear in its invested capital and the Commissioner has not determined the relative values of the several kinds of property. There can be no doubt that a very valuable good will and very valuable trade-marks and trade names were acquired at the date of the organization of the Company.

Large capital expenditures in the many years of the life of the business have been charged to expense and do not appear in the invested capital of the Company and cannot now be fully restored.

We believe from your letter that the existence of the abnormalities is not denied and we construed your letter to mean that the comparatives do not show that the Company paid a tax so excessive as to require adjustment. The use of proper comparatives in the various years will not reach that result. We requested discrimination to eliminate the Companies whose names indicate they were in the bag business, which in the years in question were engaged in speculation in cotton goods and burlap. We have furnished a list of comparatives from which representative corporations might be chosen. The taxes paid by the Companies in this list disclose fully that the tax paid by Bemis Bro. Bag Company was excessive.

(b) Additions to Surplus Account. In the claim heretofore filed, we presented a list of capital items which had been charged to expense. This list did not purport to be exhaustive. If special assessment is denied, the items listed should be restored to invested capital and the Company's

surplus should be increased accordingly. These items are as follows:

St. Louis Factory Building, charge-off in 1907	$2,555.53
Home Cotton Mills Real Estate & Building account, charge-off Nov. 30, 1909	219,853.58
Home Cotton Mills, Machinery and Fixtures account, charge-off Nov. 30, 1909	34,410.00
Bemis, Tennessee plant, one-half Y. M. C. A., donated by J. M. Bemis, and one-half paid by the Company and charged to expense in 1900	49,884.84
Bemis, Tennessee plant, charge-off of construction cost in 1901	33,599.34
Printing equipment, charge to expense	851,375.50
Intangibles acquired at date of organization allocated on the basis of St. Louis Screw Company decision (2 B. T. A. 649)	227,500.00
Total	$1,419,178.79

[fol. 61] The list above written is self-explanatory, except as to several items.

The charge down of the real estate and buildings and machinery and fixtures at the Home Cotton Mills in 1909 was made under the following circumstances:

A reduction in some of the fixed assets at the Home Mills was made in 1909, because the director of the company felt that the cost of production of a mill in the City of St. Louis was out of line with the costs at Indianapolis and the Village of Bemis, Tennessee.

For a similar reason the plant investment at Bemis, Tennessee, was fixed at a maximum of $710,000.00 and all the costs in excess of that amount were charged off.

The printing equipment has been charged to expense. The value set out in the list above written, is the value at December 31, 1916. It is the minimum of the cost. The cost of the metal alone in the patterns and plates, together with the type, in this equipment at the minimum price per pound which has ever prevailed since the Company started to accumulate this equipment, was not less than $300,000. The metal in the patterns and plates is as good as new metal and can be used over and over again.

The allocation of capital stock issued at the date of the organization of the Company pursues the decision of the Board of Tax Appeals in the case of the St. Louis Screw Company, 2 B. T. A. 649. When the Company was formed in 1885, it issued $350,000.00 in par value of capital for all of the assets of the pre-existing co-partnership. The capital and income for the first four and one-half years of the Company's existence is set forth on page 13 of the printed memorandum filed with and attached to the claim for refund, disclosing that the Company acquired with its capital stock, good will and intangible assets worth not less than $650,000.00, as well as $350,000.00 of tangible property. Under the rule laid down by the Board of Tax Appeals in the above mentioned case, thirteen-twentieths of the capital stock was issued for the intangibles and seven-twentieths was issued for the tangibles. Thirteen-twentieths of $350,000.00 amounts to $227,500 which is the amount above claimed as an addition to the Company's surplus.

The addition claimed above should be allowed the Company. Surplus should be recomputed and the excess profits tax should be based upon its revised surplus, unless assess-
[fol. 62] ments of its taxes is allowed under the relief provisions of the statute.

Yours very truly, Lowenhaupt & Waite, Attorneys for Bemis Bro. Bag Company.

State of Missouri,
City of St. Louis, ss:

Judson S. Bemis, being duly sworn, on his oath says that he is President of the Bemis Bro. Bag Company, of St. Louis; that he has read the letter above written and knows the contents thereof and that the facts therein stated are true to the best of his knowledge, information and belief.

Judson S. Bemis.

Subscribed and sworn to before me this 14th day of December, A. D. 1926. My commission expires March 26, 1928. R. C. Knapp, Notary Public.

EXHIBIT "F"

April Twelfth, 1927.

Re Bemis Bro. Bag Company, Claims for Refund, Years 1917 to 1919, Inclusive

Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: This letter is written in response to your request made at conference in your office on February 23, for more detailed information on some of the facts presented to you. These facts were and are urged as elements of the right to special assessment and they are also urged as a basis for allowance of additional invested capital. We are unable to disclose and sustain the full invested capital to which the company is entitled by virtue of the facts hereinafter stated and heretofore presented to you. The invested capital to which we have made claim is the minimum invested capital to which the company is entitled.

We shall group the facts under the various items as follows:

[fol. 63] 1. Printing Equipment—Under this heading we have presented a claim for an allowance of invested capital on account of the patterns, plates, mats, copies and type, all of which has been charged to expense in the company's accounts. The cost of material in this equipment is only a small percentage of the costs. Labor is much the greater cost. The mats and copies are made of matrix paper which of course can only be used once, but the patterns and plates are made of metal which can be used indefinitely, and the type also has intrinsic value.

You have requested us to furnish you with the cost of the metal in the patterns and plates and the cost of type possessed on December 31, 1916.

We are enclosing tabulation made by the engineers of the Bemis Bro. Bag Company showing the calculation of the weight of the metal in patterns and plates and its minimum cost. The first sheet shows that in May, 1923, when the survey was made the weight of the patterns and plates then possessed by the company was 2,141,856 pounds. The records of the company disclose that the patterns and plates possessed in 1916 contained substantially the same amount of metal.

The next sheet shows the cost of the metal during the period that these patterns and plates were acquired by the company. Stereo-metal is made of lead 82%, antimony 13%, tin 5%. The metal company from which this metal is bought charged $1.00 per hundred pounds during this whole period for mixing the metal. The freight to the bag factories of the company upon the metal averaged 35 cents per hundred pounds. The freight was as high as 75 cents per hundred pounds to some factories. This schedule shows the average cost of stereo-metal was $8.93 per hundred pounds.

Sheets 3, 4 and 5 of the engineer's report are schedules of the high and low cost of lead, antimony and pig tin during the period from 1905 to 1916. The average prices upon the second sheet of the engineer's report are based upon the average prices set forth on the succeeding pages. In support of these average prices we are sending you a copy of "Metal Statistics" 1925. On pages 441 and 443 the prices on antimony used in this schedule are set forth. On pages 331 and 333 are the prices on tin. On page 365 are the prices on lead. We are submitting this book as a check upon the prices used.

We have used the average prices during all the applicable years on all of these items. Of course when business was [fol. 64] prosperous the prices of these metals were high and the need of metal in the company's business rose when business was prosperous so that it is more probable that more of the metal was purchased at high prices than low prices.

The schedule above mentioned discloses the weight of the patterns and plates at 2,141,856 pounds, which at the unit price of $8.93 per hundred pounds (the minimum cost of the metal alone in the patterns and plates) amounts to $191,267.74.

To this figure must be added the cost of type. In the brief presented to you on the 7th day of July, 1923, the cost of type used was 50% of the cost of type in December, 1922. By the count of pieces then possessed and the application of cost equal to 50% of December, 1922 cost, the total cost of all the type possessed by the company upon the count then made was $48,004.41, and the calculated depreciated cost of the type possessed December, 1916, was

not less than $46,342.47. This last figure is made by excluding the type at the Brooklyn plant.

This sum $46,342.47 added to the cost of the metal in the patterns and plates above stated $191,267.74, shows a total intrinsic value of $237,610.21.

The foregoing is without any allowance whatsoever for the labor cost of manufacturing patterns and plates and without any allowance for labor and material costs in manufacturing mats and copies which were also part of the company's printing equipment in December, 1916. The cost stated on our original claim, to-wit: $851,375.50, is very considerably less than the total cost of all the printing equipment possessed by the company in December, 1916, even after a very broad and ample allowance for any depreciation which this equipment had then suffered.

2. Good Will Acquired at Organization.—We have secured a copy of a book by William C. Edgar entitled "Judson Moss Bemis, Pioneer", published by the Bellman Co., Minneapolis, Minn., 1926. The history of the business is detailed in this book and it shows a business of very substantial size at the date of incorporation of the corporation. Material facts appearing in this book are as follows:

The business was organized in 1858 by Judson M. Bemis and Simeon Farwell (a cousin of Judson M. Bemis). Judson M. Bemis at the time had $2,000.00 and Simeon Farwell contributed the machinery for which he was to receive a [fol. 65] one-third interest. The total capital was about $3,000.00 (Pages 112 to 114).

The second year after the business was started Edward J. Brown, a second cousin of Farwell and Bemis, became a partner and several years later Bemis & Brown acquired Farwell's interest. They were thereafter equal partners (Pages 148-150).

Several years later Judson & Bemis together with J. G. Marriot began the manufacture of cotton bag goods under the name of Bemis, Marriot & Company. The name was later changed to Home Cotton Mills.

About two years after Mr. Brown was admitted to partnership the business so increased that larger accommodations for it became necessary and in 1861 they made an arrangement with Avery & Company of Boston to act as

their purchasing agents because they had outgrown in their requirements the limited local market for raw material (Pages 154 and 155).

About 1862 they bought the plant of J. H. Drew & Company (Page 155).

Sometime prior to 1864 they opened a Boston office and Brown took charge (Page 173).

About 1864 one Henry Digby was employed as manager of the St. Louis factory with a three year contract and an interest in the profits. Desiring to discharge him, the firm was compelled to pay him $25,000.00 for his interest in the profits (Page 188).

In June, 1867, Stephen A. Bemis (an older brother of Judson) entered the employ of Bemis & Brown. In 1870 he became a partner, the firm name then being Bemis, Brown & Company (Pages 223 and 224).

Early in 1873 just before the disastrous panic of that year Judson Bemis bought Brown's half interest in the firm for $300,000.00, $75,000.00 payable in cash and the remainder in notes payable at the rate of $8,000.00 per month. He borrowed $40,000 and apparently paid the purchase price out of the business. The business thereafter was called Bemis Bro. & Company (P. 229). A branch at Minneapolis was opened in 1882. (P. 252.)

[fol. 66] In 1885 the partnership bought the building on the corner of Fourth & Poplar, much larger quarters, and the factory was moved to that location. In the same year the corporation was organized to take over the bag business, Judson M. Bemis, President, being in charge of the Boston office. Stephen A. Bemis managed the bag factory. (Page 255).

In the same year, 1885, Judson Bemis made a trip to Dundee, Scotland, to make direct connections with burlap manufacturers of which product that was then the center (Page 255).

We have also located the ledgers employed by Judson M. Bemis after he purchased Brown's interest until the company was organized in 1885. These ledgers disclose that Stephen Bemis did not contribute any capital to the partnership. He had only an interest in the profits. The ledgers disclose that the entire business was owned by J. M. Bemis from 1873 until the corporation was organized. We have not prepared financial statements from the ledgers

but the credit to Judson M. Bemis on the ledger account includes such of his investments as were taken care of by the St. Louis office, that is, it includes investments outside of this business. For instance, it includes the cost of his home on Pine Street and various stocks and possibly some loans. The ledger shows net income and the total net worth of the partnership interests from 1879 to 1884, both inclusive, as follows:

	Net income	Net worth
Year ending Nov. 30, 1879	77,436.82	277,214.42
" " " " 1880	97,531.71	296,847.31
" " " " 1881	42,972.66	355,342.68
" " " " 1882	52,452.00	366,977.59
" " " " 1883	39,860.65	409,057.59
" " " " 1884	36,874.20	420,784.38
Totals	$347,128.04	$2,126,223.97
Average	$47,854.67	$354,370.66

It will be remembered from the history set forth above that J. M. Bemis purchased the interest of Brown, his partner, in 1873, paying $300,000.00. The statement above written discloses that the partnership capital at the end of 1874 was $231,682.87. The books also show that in 1874 the business made a profit of $43,688.35 which subtracted from the capital at the end of the year would indicate that after Brown was paid out, the total net tangibles of the business was $187,994.52. If Brown was paid entirely out of the [fol. 67] business of the co-partnership then the total assets of the co-partnership at the time the deal was made with him amounted to $487,994.52. Brown was paid upon the basis of a value of $600,000.00 which would indicate payment upon the basis of a good will value of $112,005.48.

The profits in the six years from 1879 to 1884, both inclusive, amounted to $347,728.04, or an average of $57,-854.67. The average tangibles in this period amounted to $354,370.66. Seven per cent on the average tangibles is $24,805.94 which subtracted from the average net income leaves a balance of $33,048.73 shown as the earnings on the intangible assets. This sum capitalized at 12½% would indicate a good will value of $264,889.84.

The years above enumerated include the panic years of 1883 and 1884, years in which the profits of the company were much below normal. In calculating the value of good

will at that date, the six years prior to incorporation and the five years subsequent to incorporation should be consolidated. This has been done in a number of cases before the Board of Tax Appeals. At the time the corporation was formed the panic of 1883 was on the wane and the profits of the subsequent years were apparent from the profits which had been earned prior to the panic of 1883 or the depression which began in 1881. We submitted the profits and net tangibles for the four and one-half years subsequent to the incorporation of the corporation in the original brief. They were as follows:

Year ending	Net earnings	Capital and surplus
Nov. 30, 1885 (6 months)	$57,025.69	$350,000.00
Nov. 30, 1886	65,513.60	407,000.00
Nov. 30, 1887	108,009.46	448,500.00
Nov. 30, 1888	234,358.94	549,000.00
Nov. 30, 1889	129,224.12	702,500.00
Totals	$594,131.81	$2,456,000.00

The average profits for the four and one-half years after incorporation (listed above) and for the six years preceding incorporation (heretofore listed) amounted to $89,643.80. The average net tangibles during the same period amounted to $416,656.77. A seven per cent return on the average net tangibles would equal $29,165.97, which would leave out of the average profits, above stated, $60,477.83. [fol. 68] This balance capitalized at 12½ per cent shows good will value equal to $483,722.64.

The profits after incorporation are a much fairer and more accurate indication of the value of the good will at the date of incorporation because the accounts were more accurately kept, and the profits prior to incorporation were seriously impaired by the panic of 1883, from which the business did not entirely recover until 1887, but finally because the capital prior to incorporation includes a number of outside investments made by Judson M. Bemis. In some of these outside investments he suffered losses and the returns were not large on any of them. Only the ledgers are in existence for this period and we are not able to segregate all of the investments outside of the bag business exactly or state all of the losses in these outside transactions. These outside ventures included in his capital account and the small income on some and the losses on others

reduce the showing of profits earned in the business. When the company was formed all of these investments were taken out leaving its net capital $350,000.00.

We have heretofore submitted the balance sheet at Nov. 30, 1885, showing total assets aggregating $589,783.10, and total liabilities, exclusive of capital stock and surplus, aggregating $202,404.35. In this statement Bemis Bro. Bag Company's account at Minneapolis is carried at the net figure of $112,900.92, which was the amount of the individual investment in that account at the date of the formation of the company. The balance sheet as of Nov. 30, 1885 was later modified by crediting to profit and loss $23,022.10, profits earned at the Minneapolis plant up to Nov. 30, 1885.

We are not able to tell from the ledgers in existence whether or not profits from the Minneapolis plant were carried into the accounts at St. Louis prior to incorporation. The branch was transferred to the corporation when it was formed, but it appears from the corporate books and accounts that in the beginning the company carried the branch accounts independently. The investment in the Minneapolis plant was carried by the corporation at a net figure.

Of course, if the profits of the Minneapolis plant and the Honie Cotton Mills were not taken into the accounts from which the figures prior to incorporation are taken, then the income and tangible investment are understated.

As appears from this balance sheet, the net tangible investment on May 8, 1885, was $350,000, so that for the $350,000 of its capital stock the company received net tan- [fol. 69] gibles aggregating $350,000 and intangibles which were worth as shown above the sum of $483,722.64.

Under the principles set forth by the Board of Tax Appeals in the Appeal of Mandle, 4 B. T. A. 341, (acquiesced in by the Commissioner) the capital stock issued should be allocated to the tangibles and intangibles in proportion to the respective value of each. Such allocation shows that, out of the total capital stock issued, $151,270.00 in par value was issued against the tangibles and $196,730.00 in par value was issued against the intangibles, resulting in a paid-in surplus of $196,730.00.

Yours very truly, Lowenhaupt & Waite, Attorneys for Bemis Bro. Bag Company.

STATE OF MISSOURI,
City of St. Louis, ss:

E. C. Earle, being duly sworn, on his oath, states that he is See'y & Asst. Treas. of the Bemis Bro. Bag Company; that he has read the foregoing letter and knows the contents thereof and that the facts contained therein are true and correct to the best of his knowledge, information and belief.

E. C. Earle.

Subscribed and sworn to before me this 21st day of April, 1927. My commission expires March 26, 1928. R. C. Knaup, Notary Public.

EXHIBIT "H"

Treasury Department, Washington

IT:FAR:AL. CAB

Dec. 17, 1927.

Bemis Brothers Bag Company, 601 South Fourth Street, St. Louis, Missouri.

SIRS: Your claims for the refunding of $1,805,460.02, income and profits taxes for 1917, $1,270,907.97, income and profits taxes for 1918 and $606,546.31, income and profits [fol. 70] taxes for 1919 have been reconsidered in connection with your protest, the conference held in this office and a reexamination of your books of account and records.

The claims for 1917 are based upon contentions for the restoration of items written off the books, adjustment to the 1917 income and consideration under section 210 of the Revenue Act of 1917, and the claims for 1918 and 1919 upon consideration under sections 327 and 328 of the Revenue Act of 1918, as indicated below.

(a) Amount charged off on the St. Louis Factory Building in 1907	$2,555.53
(b) Amount charged off the Home Cotton Mills, Land and Buildings in 1909	219,853.58

(c) Amount claimed to have been charged off on Home Cotton Mills, Machinery and Fixtures in 1909	34,410.00
(d) Amount written off the Bemis Tennessee plant in 1900	49,884.84
(e) Amount by which the Bemis Tennessee plant was written down in 1901	33,599.34
(f) Printing equipment alleged to have been charged to expense	851,375.50
(g) Amount of intangibles acquired at date of incorporation in 1885	227,500.00
(h) Paid-in surplus—Texas Bag & Fibre Co.	56,659.92
(i) Increase in inventory of goods acquired in the purchase of the plant of the Texas Bag and Fiber Company in 1917	19,840.73

After careful consideration of your contentions and the evidence at hand the following holdings have been determined.

(a) The nature of the items making up the $2,555.53, which you contend were charged off in 1907 and the fact that no evidence is available that distinguishes them from ordinary expense items precludes their restoration to the asset account.

(b) and (c) The amount $254,263.58 which you contend was charged off on the Home Cotton Mills, Land and Buildings and Machinery and Fixtures, was entered on your [fol. 71] books as a debit to Profit and Loss and credits to Real Estate and Building Reserve and to General Machinery and Fixture Reserve.

An examination of your balance sheets discloses that the only such reserve accounts are the depreciation reserves on those assets.

In the Revenue Agent's report of June 28, 1919, adjustment was made for excessive depreciation and $200,000.00 was restored to the Buildings Accounts for excessive amounts charged off in prior years.

The entries made on your books in 1909 apparently made no change whatever in the Asset Accounts but reduced their net value through an increase in the reserves.

Inasmuch as the reserve accounts were properly adjusted in the Agent's report and prior charge-offs restored, it is

held that no further adjustment in this respect is warranted.

(d) Relative to the write-off of the Bemis Tennessee Plant represented by the amount charged as an expense on the books of the corporation in the construction of the Y. M. C. A. it is found that the amount charged off was $12,471.22 instead of $49,884.84. This does not appear to represent a capital expenditure for the corporation and its restoration to invested capital is denied.

(e) The alleged write-down of the Bemis Plant at Bemis, Tennessee, in 1901, in the amount of $33,599.34 is found to represent items amounting to $15,533.78, which are properly expensed, $18,065.56 of the amount represents a direct credit to profit and loss and thus is already included in invested capital through surplus.

(f) Your contention for the restoration of printing equipment charged to expense in the amount of $851,375.50, has been given careful consideration and it is found that all labor costs and material costs for patterns, plates, type and mats are charged directly to expense accounts in the current taxable years and it is believed such charges are proper. However, the stero metal used in producing the patterns and plates inasmuch as it has a life of several years should be capitalized at cost. The average cost of such metal from 1905 to 1916, inclusive, is $.0893 per pound. The average cost for a term of years prior to 1917 should be used instead of the average cost subsequent to that date, in determining the value of such metal on hand January 1, 1917. [fol. 72] The value is therefore determined as follows:

Weight of metal on hand January 1, 1917	1,448,745 lbs.
Average cost per pound	$.0893
Value of metal 1,448,745 x $.0893	$129,372.93

The amount of $129,373.93 is, therefore, restored to Printing Equipment and the balance of the $851,375.50, or $722,002.57, is disallowed for restoration to invested capital on the ground that it has been properly charged to expense. Since replacements to metal are expense no depreciation is allowable.

(g) Relative to the value of intangibles acquired in 1885 it is held that in accordance with regulations only such value

as intangibles possessed in the hands of the predecessor is allowable for invested capital purposes.

Net income for the last six years prior to incorporation is therefore used as the basis for determining the value of good will.

Fiscal year ended	Total income per books	Salary paid S. A. Bemis	Net income	Worth of tangible assets
11/30/1878.....	.....	.....	.....	$277,214.42
11/30/1879.....	$77,436.82	$12,906.14	$64,530.68	296,847.31
11/30/1880.....	97,531.71	16,255.28	81,276.43	355,342.68
11/30/1881.....	42,972.50	7,162.11	35,810.55	366,977.59
11/30/1882.....	52,452.00	8,742.00	43,710.00	409,057.59
11/30/1883.....	39,860.65	6,643.44	33,217.21	420,784.38
11/30/1884.....	36,874.20	6,145.70	30,728.50	.....
Totals...	$347,127.88	$57,854.67	$289,273.37	2,126,223.97
Average..	.....	9,642.44	$48,212.23	$354,370.66

Inasmuch as the above figures do not include any salary for the sole owner, Judson M. Bemis, and only net income after all proper deductions and allowances are made should be considered in the valuation, a deduction of the same amount allowed as salary to S. A. Bemis is made as a salary allowance for Judson M. Bemis, that is an average salary of $9,642.44.

Average net income before deducting salary allowance for J. M. Bemis	$48,212.23
Less:	
Salary allowance, J. M. Bemis average	9,642.44
Adjusted average net income	$38,569.79
8% applicable to tangible assets:	
(A. R. M. 34) 8% of $354,370.66	28,349.65
[fol. 73] Income applicable to intangibles	10,220.14
Income applicable to intangibles capitalized on the basis of 15% (A. R. M. 34)	68,134.27

The value of $68,134.27 is, therefore, allowed for intangibles acquired in 1885.

(h) Relative to the contention for the allowance of $56,659.92 paid-in surplus on account of the acquisition of the assets of the Texas Bag and Fiber Company in 1917, investigation discloses that there was no affiliation prior to July 1, 1917. The majority of stockholders of the Bemis Brothers Bag Company were not stockholders in the Texas Bag and Fiber Company.

No evidence is submitted to substantiate a market value higher than the cash price paid for the assets, and the fact that they were purchased for cash would appear to fix their market value at the price paid. The depreciation policy of the predecessor company is not shown and the book value of its assets if not sustained by the evidence at hand. The claim for paid-in surplus on account of this transaction is therefore disallowed.

(i) Investigation of your contention relative to the increase of inventory and decrease of fixed assets in the valuation of assets acquired from the Texas Bag and Fiber Company discloses that the reallocation results as follows:

Credit to buildings	$12,515.08
Credit to machinery and fixtures	6,174.15
	18,689.23
Increase in inventory	19,840.73
Credit to factory supplies	1,151.50
Net change in income for 1917	18,689.23

This represents an increase in purchases for 1917 and therefore a decrease in income for that year of $18,689.23.

Inasmuch as fixed assets are reduced depreciation deductions should also be reduced and income correspondingly increased from July 1, 1917 and for subsequent years.

Your contentions for consideration under Section 210 of the Revenue Act of 1917 for 1917 and of Sections 327 and 328 of the Revenue Act of 1918 for 1918 and 1919, have been duly considered and no new evidence has been found to [fol. 74] show that your invested capital or net income is affected by abnormal conditions which would justify the Bureau in computing your tax under the above-mentioned relief sections for any of the years involved.

The computation of your tax liability for 1917 under the provisions of Section 210 of the Revenue Act of 1917 and for 1918 and 1919 under the provisions of Sections 327 and 328 of the Revenue Act of 1918 is, therefore, denied.

The recomputation of your tax liability in accordance with the above findings follows:

Years	Overassessment
1917	$32,675.42
1918	14,054.18 (Barred)
1919	9,073.15 (Barred)
Total Overassessment	55,802.75
Net Overassessment allowed	32,675.42

1917

Net income shown on your amended return	$9,724,880.11
Plus:	
1. Reduction in the amount of depreciation allowed	310.38
Total	$9,725,190.49
Less:	
2. Increase in purchases	18,689.23
Adjusted net income	$9,706,501.26

1. Depreciation is reduced from July 1, 1917 by 2% on $12,515.08, building account, and 6% of $6,174.15, machinery and fixtures which were reallocated to inventory in the assets acquired from the Texas Bag and Fiber Company.

2. Income is reduced by the amount of increase allowed in the inventory purchased from the Texas Bag and Fiber Company.

Invested Capital

Invested capital January 1, 1917, as shown by your amended return	$16,536,924.93
Plus:	
1. Value of Stereo-metal restored to the asset accounts	129,372.93
2. Value allowed for good will acquired in 1885	68,134.27
Adjusted invested capital	$16,734,432.13
Percentage deduction 9%	1,506,098.89
Specific deduction	3,000.00
Total deduction	$1,509,098.89

1 and 2. See explanation of allowances on prior pages of letter.

[fol. 75] Computation of Tax

% of capital	Income	Deductions	Balance subject to tax	Rate	Amount of tax
15%	$2,510,164.82	$1,509,098.89	$1,001,065.93	20%	$200,213.19
5%	836,721.61	.....	836,721.61	25%	209,180.40
5%	836,721.61	.....	836,721.61	35%	292,852.56
5%	1,338,754.57	.....	1,338,754.57	45%	602,439.56
Balance	4,184,138.65	.....	4,184,138.65	60%	2,510,483.19
Total	9,706,501.26	1,509,098.89	8,197,402.37		3,815,168.90
Excess profits tax					3,815,168.90
Net income			9,706,501.26		
Less:					
Excess profits tax			3,815,168.90		
Amount subject to 2% and 4% tax			5,891,332.36		
Amount of tax at 2%					117,826.65
Amount of tax at 4%					235,653.29
Total tax assessable					$4,168,648.84

Tax previously assessed:	
Original assessment, #36750608	4,183,481.82
Additional assessment, May 1920, page 18, Line 6	17,842.44
Total tax assessed	4,201,324.26
Total tax assessable, 1917	4,168,648.84
Overassessment	$32,673.42

1918

Net income shown on amended return	$10,153,439.00
Plus:	
1. Reduction in depreciation	620.75
Adjusted net income	10,154,059.75

1. See explanation for 1917.

Invested Capital

Invested capital shown on amended return	$21,873,300.70
Plus:	
1. Value of Stereo-metal restored	129,372.93
2. Value allowed for good will	68,134.37
3. Depreciation reduced 1917	310.38
4. Decrease in prorated tax for the prior year $32,675.42 x .55068	17,993.70
Total	22,089,111.98

[fol. 76]

Less:	
5. 1917 income reduced through inventory purchased from Texas Bag and Fiber Company	18,689.23
Adjusted invested capital	22,070,422.75
Average invested capital prewar period	10,094,253.54
Increase	11,976,169.21

1 to 5, inclusive, Items are already explained in this letter in previous paragraphs.

Excess Profits and War Profits Credit

8% of invested capital	1,765,633.82
Specific exemption	3,000.00
Excess profits credit	$1,768,633.82
Average prewar net income	2,091,525.88
Plus:	
10% of increase	1,197,616.92
Total	$3,289,142.80
Exemption	3,000.00
War profits credit	$3,292,142.80

Computation of Tax

% of capital not over	Income	Excess profits credit	Amount subject to tax	Rate	Amount of tax
20%	$4,411,000.79	$1,768,633.82	$2,642,366.97	30%	$792,710.09
Balance	5,743,058.96		5,743,058.96	65%	3,732,988.32
Total	10,154,059.75	1,768,633.82	8,385,425.93		4,525,698.41

Net income	10,154,059.75	
Less:		
War profits credit	3,292,142.80	
Balance	6,861,916.95	
80% of balance	5,489,533.56	
Less:		
Excess profits tax	4,525,698.41	
War profits tax		963,835.15
Total profits tax		$5,489,533.56
Net income	10,154,059.75	
Less:		
Interest on U. S. Obligations not exempt. $46,737.32		
Profits tax 5,489,533.56		
Exemption 2,000.00		
[fol. 77]	5,538,270.88	
Amount taxable at 12%	4,615,788.87	
Amount of tax at 12%		553,894.66
Total tax		6,043,428.22
Less:		
Profits taxes paid to Canada		10,754.12
Net tax assessable		6,032,674.10
Tax previously assessed:		
Original assessment, #401199		5,947,513.30
Additional assessment, March 1920, Page 17, Line 9		99,214.98
Total tax assessed		6,046,728.28
Net tax assessable		6,032,674.10
Overassessment		14,054.18

1919

Net income shown on return	$9,516,099.10
Plus:	
1. Depreciation disallowed in Revenue Agent's report August 25, 1920	77,666.16
2. Additional reduction of depreciation	620.75
Adjusted net income	9,594,385.01

1. Depreciation is computed in accordance with article 161, Regulations 45, as shown in the depreciation schedule attached to the Revenue Agent's report of August 25, 1920.

2. Depreciation in the amount of depreciable assets reallocated to inventory in 1917 is restored to income.

Invested Capital

Invested capital shown in Schedule B, Page 7, Revenue Agent's report	$25,644,428.89
Plus:	
1. Value of Stereo Metal restored	129,372.93
2. Value allowed for good will	68,134.27
3. Depreciation reduced in 1917 and 1918	931.13
4. Decrease in the prorated tax for prior year, $14,054.18 x .4226	5,939.29
Total	$25,848,806.51
Less:	
5. Reduction to surplus through 1917 income reduction on account of adjustment to assets purchased from Texas Bag and Fiber Company	18,689.23
Adjusted invested capital	25,830,117.28

[fol. 78] 1 to 5, inclusive. All adjustments are explained in this letter in previous paragraphs.

Excess Profits Credit

8% of invested capital	2,066,409.38
Exemption	3,000.00
Excess profits credit	2,069,409.38

Computation of Tax

% of Capital	Income	Credit	Amount subject to Tax	Rate	Amount of Tax
20%	$5,166,023.46	$2,069,409.38	$3,096,614.08	20%	$619,322.81
Balance	4,428,362.55	.....	4,428,362.55	40%	1,771,345.02
Totals	9,594,386.01	2,069,409.38	7,524,976.63		2,390,667.83

Profits tax for 1919			$2,390,667.83
Net income		$9,594,386.01	
Less:			
Interest on United States Obligations	$49,284.17		
Profits Tax	2,390,667.83		
Exemption	2,000.00	2,441,952.00	
Amount taxable at 10%		7,152,434.01	
Amount of tax at 10%			715,243.40
Total tax			$3,105,911.23
Less:			
Profits taxes paid to Canada			115,229.56
Net tax assessable			2,990,681.67
Tax previously assessed:			
Original assessment, #402600			2,965,124.51
Additional assessment, November, 1920, Page 9, Line 16			34,630.31
Total Tax assessed			2,999,754.82
Net tax assessable			2,990,681.67
Overassessment			$9,073.15

In view of the above your claim for the refund of $35,355.79, income and profits taxes for 1917, will be allowed for $32,675.42 and your claim for the refunding of $1,770,104.23 for 1917 will be rejected in full, in the next schedule to be approved by the Commissioner.

Inasmuch as computation of your tax liability for 1918 and 1919 under the provisions of Sections 327 and 328 of the Revenue Act of 1918 is denied and your claim for the refunding of $1,270,907.97 for 1918 is confined to that point, [fol. 79] it will be rejected in full in the next schedule to be approved by the Commissioner.

Your claim for the computation of your tax liability for 1919 under the provisions of Sections 327 and 328 has already been rejected.

The overassessments indicated for 1918 and 1919, not being covered by proper claims are barred by the Statute of Limitations and cannot be allowed.

The overassessment for 1917 shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official, in accordance with Section 284 of the Revenue Act of 1926.

A copy of this communication has been furnished to your authorized representatives, Messrs. Lowenhaupt and Waite, 830 Pierce Building, St. Louis, Missouri.

Respectfully, C. B. Allen, Deputy Commissioner.

EXHIBIT "I"

Lowenhaupt & Waite, Attorneys-at-law, Suite 928-932 Planters Building, Saint Louis, Mo.

Abraham Lowenhaupt, Stanley S. Waite

December Twenty-second, 1927.

Commissioner of Internal Revenue, Washington, D. C.

Reference: IT:FAR:A1—CAB. Bemis Bro. Bag Company, 601 S. Fourth Street, St. Louis, Mo. Claims for refund. Your letter dated Dec. 17, 1927.

[fol. 80] DEAR SIR: We are in receipt of your letter above referred to listing your findings of overassessment as follows:

1917	$32,675.42	
1918	14,054.18	(barred)
1919	9,073.15	(barred)
Total overassessment	$55,802.75	
Net overassessment allowed	$32,675.42	

We have examined the findings in your letter hurriedly and feel satisfied that the denial of special assessment and of the restoration to invested capital of many of the items submitted and of the calculation of the cost of others, is unduly harsh and is not justified by the facts. We are not, however, prepared to submit the data or the reasons for our objections at this time.

We now direct your attention to the fact that your finding that no claims for refund for the years 1918 and 1919, sufficient to sustain this right and to prevent the running of the statute of limitations were filed, is not sustained by the facts. Upon the basis that the claims for refund do not show the right to relief, which is now found, you rule that the overassessments for the last mentioned two years are barred.

You also state in your letter that the claim for refund for 1919 has been heretofore overruled. In this connection your attention is called to the fact that this ruling was immediately suspended and the taxpayer was granted further consideration of his claim.

As to the sufficiency of the claims for refund filed, you apparently have overlooked the following facts.

The claims for refund for 1918 and 1919 are identical and it will be sufficient to refer to one of them. The claim for refund for 1918, filed in January, 1924, is typical and states:

"Deponent verily believes that this application should be allowed for the following reasons:

"The Excess Profits Tax and War Profits Tax against this company for the year 1918 should be assessed under the provisions of Section 327 and 328 of the Revenue Act of 1918.

"The facts and argument in support of this claim are contained in a brief, duly verified, which has been filed with [fol. 81] the Commissioner of Internal Revenue, in support of a claim for refund made in connection with the company's return for 1917 and the tax paid thereon. The facts and circumstances which entitle the company to assessment under said sections for 1917 obtained also in 1918. In order to simplify matters and avoid repetition, the brief filed with the claim for refund for 1917 (a copy of which brief is attached hereto) by reference thereto is made a part of this claim."

The printed brief filed for the year 1917 was attached to the claim for 1918 (and the claim for 1919), filed therewith and by reference thereto made a part thereof.

In said brief the following statements occur:

Page 5:

"The items that we have discovered are such as might properly have been capitalized, but the entries made which would have resulted in their capitalization were afterwards reversed by the officers of the Company."

Page 14:

"If the value of the respective kinds of property could be satisfactorily determined this Company would be entitled to additional invested capital under the provisions of Article 57 of Regulations 44 and T. B. R. 49 and A. R. R. 307."

Page 15:

"Upon any proper accounting of the purchases, mergers and consolidations above stated, value and cost should be assigned to the good-will of the companies acquired."

Page 27:

"(1) A large part of the cost of construction, betterment and repair of plants and equipment and the total cost of its printing plates was charged to expense in the years prior to 1917."

Items entitled St. Louis Bag Factory, Bemis Cotton Mill Plant and Brand Printing Plates were all listed in said

brief as items which should be restored to invested capital as stated in the first quotation from the brief above written, and the good will is claimed as an addition to invested capital as appears from the quotation from page 14. Every fact to which you have given effect as invested capital in calculating this overassessment was cited and claimed as such in said brief.

[fol. 82] All of the facts upon the right to the restoration of the items to invested capital resulting in the overassessment, which you have now found, were submitted to the Commissioner of Internal Revenue at that time and he was fully advised of them. We asserted in connection with such facts that the exact costs of these items could not be determined and therefore the invested capital of the taxpayer could not be determined and, on that basis, prayed for special assessment. You have now found that the cost can be determined.

The purpose of a claim for refund is to advise the Commissioner of Internal Revenue of the facts and it thereupon becomes his duty to apply the law to such facts. This claim for refund fully advised the Commissioner of all the facts upon which this assessment is now based. It is true that the overassessment is found upon a different basis from that upon which it was prayed but in this kind of a proceeding the prayer for relief is never a part of the cause for action. In Corpus Juris, Vol. 31, p. 110, concerning pleadings in actions at law in code states, the law is stated as follows:

"The prayer for relief forms no part of the statement of the cause of action; and it is unimportant unless there is ambiguity in such statement. A bad prayer for relief or a prayer for improper relief will not vitiate a pleading which is otherwise sufficient. The facts alleged, and not the relief demanded, are of chief importance, and they determine the relief to be granted."

The only purpose of a claim for refund is to advise the Commissioner of the facts, in order that he may pass upon the merits and result of such facts under the law. The mere fact that the taxpayer asks that they be given a certain effect does not deprive him of the right to the other effect to which the Commissioner finds that they are entitled.

In Tucker vs. Alexander, 15 Fed. (2nd) 356 (later reversed by the Supreme Court) the Court gave effect to all of the government's contentions concerning the necessity for a claim for refund based upon the facts upon which the suit is brought. The Court says in that case:

"The evident purposes and objects of this condition are to afford the Commissioner an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto. Unless the claimant were required to present to the Commissioner all [fol. 83] of the grounds upon which he relies for refund, the above purposes and objects would be partially or entirely defeated. The resort to the courts is allowed only because the Commissioner will not correct the wrong claimed to have been done."

In the Tucker case, as the Court states, the claim for refund was general in its terms but was made specific through the incorporation of a letter from the deputy commissioner which set forth the grounds of protest. However there were no facts set out in said claim in support of the grounds asserted. Consequently it was impossible for the Commissioner to decide the question set forth in taxpayer's petition when he considered the claim.

Of course, no such situation is presented by the instant case. While the relief asked on the face of the printed form was by way of special assessment, still the printed brief which was incorporated in the claim for refund plainly set out all the facts and states that if the cost of the items can be found it should be restored to invested capital. With these facts and this prayer before the Commissioner, he was in duty bound under the claim as filed to restore to invested capital the items that had been written off the books and the cost of other items, provided they could be ascertained.

When the Tucker case reached the Supreme Court of the United States (Tucker vs. Alexander, Decided November 21, 1927) that court reversed the decision of the Circuit Court of Appeals and held that the government had waived any objection to the sufficiency of the description of the

claim filed by failure to make this an issue in the trial court. The court used this significant language:

"But no case appears to have held that such objections as that urged here may not be dispensed with by stipulation in open court on the trial. The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery. If compliance is insisted upon dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitation. If the Commissioner is not deceived or misled by the failure to describe accurately the claim as obviously he was not here, it may be more convenient for the government and decidedly in the interests of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon gov- [fol. 84] ernment and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose."

You will note that the Supreme Court held that even where the issues raised by the taxpayer at the trial of the case were not set out in the claim for refund at all, the objection may be waived on the part of the government especially if the Commissioner is not deceived or misled by failure to describe accurately the claim.

While, as above stated, our claim is technically sufficient to permit the refund of the overpayments, still, if it were not you are in a position to follow the court's ruling in the Tucker case and to waive a defect in the description of the claim filed, inasmuch as all the facts are stated and you could not possibly have been deceived.

While we are convinced that you will, after having had these matters brought to your attention, hold that our claims are sufficient, still, even though there is yet some doubt in your mind, we presume you desire to do exact justice in all cases and not withhold money due a taxpayer on a mere technicality which the highest court has held may be waived.

We respectfully ask your reconsideration of this matter and the reversal of your ruling as to the years 1918 and 1919.

Yours very truly, Lowenhaupt & Waite, Hopkins, Starr, Hopkins & Hamel, Attorneys for Bemis Bros. Bag Company.

EXHIBIT "K"

IT:E:RR. JSR

January 20, 1928.

Lowenhaupt and Waite, 928-32 Planters Building, St. Louis, Missouri.

SIRS: Reference is made to your letter of December 22, 1927, referring to office letter dated December 17, 1927, which advised you of the overassessments disclosed for the [fol. 85] years 1917, 1918 and 1919 in favor of the Bemis Brothers Bag Company, St. Louis, Missouri, and also that the overassessments for the latter two years were barred from allowance by the statutory period of limitation applicable to the years 1918 and 1919 due to the failure of the taxpayer to file timely refund claims.

You contend that the action taken by the Bureau is erroneous inasmuch as refund claims were filed for the years 1918 and 1919 and that attached to each claim and made a part thereof, was a copy of the printed brief upon which the adjustments for 1918 and 1919 were based. The claim for 1918 which is identical with that filed for 1919 reads as follows:

"Deponent verily believes that this application should be allowed for the following reasons:

"The Excess Profits Tax and War Profits Tax against this Company for the year 1918 should be assessed under the provisions of Section 327 and 328 of the Revenue Act of 1918.

"The facts and argument in support of this claim are contained in a brief, duly verified, which has been filed with the Commissioner of Internal Revenue, in support of a claim for refund made in connection with the company's

return for 1917 and the tax paid thereon. The facts and circumstances which entitle the company to assessment under said sections for 1917 obtained also in 1918. In order to simplify matters and avoid repetition, the brief filed with the claim for refund for 1917 (a copy of which brief is attached hereto) by reference thereto is made a part of this claim."

The purpose of the brief was to substantiate your position that the invested capital of the company could not be determined and that the company was, accordingly, entitled to consideration under the provisions of Section 210 of the Revenue Act of 1917, and Sections 327 and 328 of the Revenue Act of 1918. The claims for refund were filed in order that any refund due the company in event that special assessment were allowed would not be barred by the statutory period of limitations.

Upon consideration of the brief the company was denied special assessment for the years 1917, 1918 and 1919. Certain adjustments were made, however, to the company's invested capital which decreased the company's tax liability [fols. 86 & 87] for those years. The overassessments for 1918 and 1919 resulted from the adjustments made with respect to 1917.

This office has carefully considered the contentions set forth in your letter and has come to the conclusion that in view of the fact that the basis of the claims filed for 1918 and 1919 was special assessment and since special assessment was denied no further action may be taken with respect to such claims.

Regarding the case of Tucker v. Alexander mentioned in your letter you are advised that the facts in that case and those in the instant case are totally dissimilar. In the Tucker case the statutory period of limitation within which a claim for refund could be filed for the year involved had not expired and in order to avoid further litigation the Commissioner and the taxpayer stipulated as to the agreed facts which should be presented to the court for a decision.

The instant case is, accordingly, closed on the basis of office letter dated December 17, 1927.

Respectfully, (Signed) C. B. Allen, Deputy Commissioner.

JB-4.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 88] Appearances of counsel omitted in printing.

[fol. 89] Minute entry of argument and submission, May 23, 1932, omitted in printing.

[fol. 90] In United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1932

No. 9415

Bemis Bro. Bag Company, a Corporation, Appellant,

vs.

United States of America, Appellee

Appeal from the District Court of the United States for the Eastern District of Missouri

Mr. Abraham Lowenhaupt (Mr. Spencer M. Thomas and Messrs. Lowenhaupt & Waite were with him on the brief) for appellant.

Mr. Frederick W. Dewart, Special Attorney, Bureau of Internal Revenue (Mr. Louis H. Breuer, United States Attorney, Mr. Claude M. Crooks, Assistant United States Attorney, and Mr. C. M. Charest, General Counsel, Bureau of Internal Revenue, were with him on the brief), for appellee.

Before Gardner and Sanborn, Circuit Judges, and Nordbye, District Judge

Opinion—Filed Aug. 29, 1932

Nordbye, District Judge, delivered the opinion of the court:

This action was brought to recover income and excess profits taxes paid by appellant for the years 1918 and 1919.

The collector to whom the taxes were paid having gone out of office, the action was brought directly against the United States. The action was tried to the Court without a jury [fol. 91] on an agreed statement of facts. The only question presented to the lower court was whether or not the plaintiff in its claim for refund, at any time before the running of the statute of limitations, stated the facts or grounds upon which it asserted its right to a refund.

Paragraph 18 of the stipulation provides as follows:

"If the appellant within the time provided by law, filed claims for refund for the years 1918 and 1919 respectively, which under the law were sufficient to be the required preliminary for the maintenance of this action on that ground, above stated, then appellant may be entitled to judgment for the year 1918 in the amount of $14,054.18, with interest, and for the year 1919 in the amount of $9,073.15, with interest.

If the claims for refund filed by the appellant for the years 1918 and 1919 respectively, were not sufficient under the law to be the required preliminary for the maintenance of this action on that ground, the appellee will be entitled to judgment dismissing this action."

The appellant on February 29, 1924, filed its claim for refund for 1918 of $1,270,907.97, and on December 12, 1924, its claim for refund for 1919 in the sum of $606,546.13. These claims for refund were based on the contention that the excess profits tax and war profits tax should be assessed under the provisions of Sections 327 and 328 of the Revenue Act of 1918. These sections are relief statutes enacted for the purpose of relieving a taxpayer from an excessive tax. Provision is made in Section 327 for cases where the Commissioner is unable to determine the invested capital of the taxpayer and in Section 328 it is provided that "in the cases specified in Section 327, the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to the average net income (in excess of the specific exemption of $3,000) for such year."

In filing its claims for refund for the years 1918 and 1919, reference was made to a brief theretofore filed in [fol. 92] support of the claim for refund for the 1917 taxes, and an additional brief was filed in support of the claims for refund for the years 1918 and 1919. The claim for refund for the year 1918 stated the following:

"Deponent verily believes that this application should be allowed for the following reasons: The Excess Profits Tax and War Profits Tax against this company for the year 1918 should be assessed under the provisions of Sections 327 and 328 of the Revenue Act of 1918.

The facts and argument in support of this claim are contained in a brief, duly verified, which has been filed with the Commissioner of Internal Revenue, in support of a claim for refund made in connection with the company's return for 1917 and the tax paid thereon. The facts and circumstances which entitle the company to assessment under said sections for 1917 obtained also in 1918. In order to simplify matter and avoid repetition the brief filed with the claim for refund for 1917 (a copy of which brief is attached hereto) by reference thereto is made a part of this claim."

The brief attached to the claim for refund and by reference made a part of it states as follows:

"In re Claim of Bemis Bro. Bag Company for Refund of Taxes for the Year 1917 Based Upon Right to Special Assessment

To the Honorable Commissioner of Internal Revenue, Washington, D. C.:

Bemis Bro. Bag Company has heretofore filed its claim for refund of taxes for the year 1917, based upon the right to assessment of its Excess Profits Taxes under Section 210 of the Revenue Act of 1917. It now desires to elaborate and present in detail the reasons why its Excess Profits Tax for said year should be so determined.

Statement

The facts are hereafter stated in the order and under the subdivision above writtten.

I. Reasons why the tax should be so determined and the facts upon which such reasons are based.

V. Relief sought.

[fol. 93] Relying upon the sufficiency of the facts above recited to entitle it to the assessment of its Excess Profits Tax liability under the provisions of Section 210 of the Revenue Act of 1917, Bemis Bro. Bag Company has heretofore presented a claim for refund for the year 1917."

A similar statement and a similar reference to the 1917 brief was used in filing the claim for refund for the year 1919.

The appellant in filing its claim for refund for the years in question, in the brief above referred to, attempted to set forth in substantiation of its claim, the fact that injustice would be done if it were not permitted to receive the benefit of the special assessment provided in Sections 327 and 328 of the 1918 Revenue Act. It proceeded to set forth in detail the various phases of its business which made it difficult to determine the values of the several classes of property that were paid in for stock. It is quite apparent that the appellant was concerned over the large tax it was required to pay to the Government, and felt that the relation of its income to its invested capital was strikingly abnormal. It set out a large number of reasons why it was entitled to a tax based on a comparison with representative corporations engaged in a like or similar business. Instances were cited of the accounting policy of the company in previous years where expenditures were charged to expense or profit and loss, when good accountancy would have justified the capitalization thereof. As an example of the conservative methods employed by the company, reference was made to certain printing plates which are used for the purpose of printing the various brands on the bags that are manufactured by the appellant. That is, the appellant is equipped to print upon the bags manufactured, the user's brands. During the years it has been in business, it has accumulated a large amount of printing sets for the printing of user's brands, which it contended were reasonably worth $851,375.50. The value was accordingly to the taxpayer something more than the mere consideration of bare

labor and material that went into the manufacture of the printing set. It represented the results of alert business solicitation and advertising with years of service that has been rendered by it to its customers; consequently, it contended in this presentation to the Commissioner, that the printing equipment represented an accumulation of years of good-will, and although expense had been charged from [fol. 94] year to year for the actual outlay for labor and material, no portion of this value had ever been added to the invested capital.

The facts concerning the original incorporation of the company and the early history of the corporation were presented to substantiate the failure on the part of the company to capitalize its goodwill in the proper amount. New plants, it was contended, had been obtained from time to time, and no good-will value was set up on the books for the different properties that were acquired in the long period of time that it had been engaged in the manufacturing business. Failure to properly capitalize certain patent rights was also set forth in the taxpayer's brief. Not all the various items which were incapable of proper valuation and which should have gone into capital were set forth. It was merely the intention of the taxpayer as disclosed by its brief, to throw some light upon what appeared to be abnormal profits upon which it was assessed; and it was contended by the taxpayer that the showing made entitled it to the special assessment that it requested. In other words, the various phases of the business of the taxpayer were set forth in order that the Commissioner would be convinced that the large taxes that had been assessed arose on account of under-capitalization, rather than excessive profits.

Section 156, Title 26, U. S. C. A. provides that:

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue according to the provisions of the law in that regard,

and the regulations of the Secretary of the Treasury established in pursuance thereof. * * *"

The statute of limitations applicable fixes the time for filing such claim at four years after the payment of any part of the taxes. The claims filed on February 29, 1924, and December 12, 1924, were timely, and were duly considered by the Commissioner on their merits. On October [fol. 95] 30, 1926, a communication was sent by the Treasury Department to the taxpayer, a portion of which reads as follows:

"You are advised that after careful consideration and review your application under the provisions of Section 327 of the Revenue Act of 1918 has been denied for the reason that the evidence presented fails to establish that your invested capital or net income is affected by abnormal conditions which would justify the Bureau in computing your tax under the provisions of Section 328 of the above mentioned Act.

In accordance with the above conclusions, your claim for refund will be rejected in full."

On November 27, 1926, a second communication was sent by the Treasury Department to the taxpayer, a portion of which reads as follows:

"After careful consideration and review, your application under provisions of Sections 210 and 327 of the Revenue Acts of 1917 and 1918 for assessment of your profits tax as prescribed in Sections 210 and 328 of the above mentioned Acts has been denied, inasmuch as the audit disclosed no exceptional hardship evidenced by gross disproportion between the tax computed by reference to representative concerns specified in Sections 210 and 328.

In accordance with the above conclusions, your claims for refund of $1,770,104.23 and $35,355.79 for 1917 and $1,270,907.97 for 1918 will be rejected in full."

It is clear that the claim for special assessment for the years 1918 and 1919 was rejected by these letters. On December 13, 1926, after the statute of limitations had run on these claims, the appellant sent to the Commissioner a

communication referring to the rejection and among other things said:

"We protest against the rejection of said claims for refund for the following reasons:

(a) The excess profits tax against the Company for the year 1917 should be determined under Section 210 of the Revenue Act of 1917 and the excess profits and war profits taxes for the years 1918 and 1919 should be determined [fol. 96] under Section 328 of the Revenue Act of 1918. The denial of said right must be based upon the use of improper comparatives as representative.

(b) If the assessment of the excess profits taxes against the Company in the manner claimed in the above subdivision is denied, then the items heretofore presented which have been improperly eliminated from invested capital should be restored to invested capital and the excess profits tax recalculated on that basis."

Further communication was sent by the taxpayer under date of April 12, 1927. Under date of December 17, 1927, the Commissioner wrote advising that the claims for the years 1917, 1918 and 1919 had been reconsidered in connection with the taxpayer's protest, and the entire matter was then reviewed by the Commissioner, and the following is a portion of the communication so sent:

"In view of the above, your claim for the refund of $35,355.79, income and profits taxes for 1917, will be allowed for $32,675.42 and your claim for the refunding of $1,770,104.23 for 1917 will be rejected in full, in the next schedule to be approved by the Commissioner.

Inasmuch as computation of your tax liability for 1918 and 1919 under the provisions of Sections 327 and 328 of the Revenue Act of 1918 (provision for special assessment) is denied and your claim for the refunding of $1,270,907.97 for 1918 is confined to that point, it will be rejected in full in the next schedule to be approved by the Commissioner.

Your claim for the computation of your tax liability for 1919 under the provisions of Sections 327 and 328 has already been rejected.

The over-assessments indicated for 1918 and 1919 not being covered by proper claims are barred by the Statute of Limitations and cannot be allowed."

In the review that was made by the Commissioner, the printing equipment items were considered, and it was determined by the Commissioner that the stereo metal used in producing the patterns and plates should be capitalized at cost in that it had a life of some years. The following is quoted from the Commissioner's letter of December 17, 1927:

[fol. 97] "Your contention for the restoration of printing equipment charged to expense in the amount of $851,375.50, has been given careful consideration and it is found that all labor costs and material costs for patterns, plates, type and mats are charged directly to expense accounts in the current taxable years and it is believed such charges are proper. However, the stereo metal used in producing the patterns and plates inasmuch as it has a life of several years should be capitalized at cost. The average cost of such metal from 1905 to 1916, inclusive, is $.0893 per pound. The average cost for a term of years prior to 1917 should be used instead of the average cost subsequent to that date, in determining the value of such metal on hand January 1, 1917."

The Commissioner then determined that the amount of $129,372.93 should be restored to printing equipment, and that the balance of the $851,375.50, or $722,002.57, should be disallowed for restoration to invested capital on the ground that it had been properly charged to expense. In making his computations, the Commissioner found that after restoring the amount of $129,372.93 to the printing equipment, there had been an overassessment of $14,054.18 in the tax paid for the year 1918, and $9,073.15 in the tax paid in the year 1919. The overassessments for the year 1917 were allowed, however, for the years 1918 and 1919 they were disallowed by the Commissioner because he contended that no proper claims had been filed before these claims were barred by the statute of limitations.

The fact that the Commissioner took it upon himself in considering the 1917, 1918 and 1919 taxes, to reconsider the entire application, would not be of any avail to the appellant if in truth and in fact, the claim for refund sued upon herein was not filed with the Commissioner within the statutory period. It is not seriously contended by the appellant that the Commissioner waived any rights of the Government by his communication of December 17, 1927. The Commis-

sioner would have no authority to extend the statute of limitations after the expiration thereof. The letter of December 13, 1926, from the appellant to the Commissioner was written after the claims filed in 1924 were denied and after the statute of limitations had expired. The only question, therefore, presented to this Court is whether or not the claims for refund filed by appellant on February 29, 1924, and December 12, 1924, were sufficient, under the law, to be [fol. 98] the required preliminary for the maintenance of this action, which is based on over-payment of its taxes for 1918 and 1919 on the grounds that its invested capital is a larger amount than was set forth in its return for those years. The trial court held that the original application asked for a special assessment and in its application for special assessment, there was no indication that the taxpayer contended that it was entitled to a reduction of its taxes on the ground that there was certain printing material that should have been added to its invested capital. In other words, the trial court held that this action is based upon a new and inconsistent ground compared to the original application for tax refund, and that for the reason that the original claim for refund did not state the grounds which are the basis for this suit, that no recovery can be had herein.

In the case of Tucker v. Alexander, 15 Fed. (2d) 356, 357, the Court stated:

"Therefore, we think it is a required precedent or limitation that the action shall be upon the same grounds and only such as are presented in the claim. As no ground in this petition is stated in the claim for refund, we think this petition has no standing under the issues tendered by the petition."

In the case of Red Wing Malting Co. v. Willcuts, 15 Fed. (2d) 626, 634, the Court stated:

"The precise ground upon which the refund is demanded must be stated in the application to the Commissioner, and we think, if that is not done, a party cannot base a recovery in the Court upon an entirely different and distinct ground from that presented to the Commissioner."

In the case of United States v. Felt and Tarrant Manufacturing Company, 283 U. S. 269, the Supreme Court had

a very similar question presented to it. In that case, the taxpayer filed a claim for refund asking for special assessment as in the instant case. This was denied and it brought suit on the basis that its gross income should be decreased by items of exhaustion or obsolescence of patents. The Supreme Court said on Page 271:

"That section provides for a special method of assessment of excess profits taxes in any case where the Secre- [fol. 99] tary of the Treasury is unable satisfactorily to determine the invested capital of the taxpayer. It has no relation to deductions from gross income on account of exhaustion or obsolescence of patents. In support of its claim, which was ultimately allowed in part, respondent prepared and filed a brief, and an oral argument was held in the office of the Commissioner; but neither in its claim for refund, its brief, nor at the hearing, was mention made of the deduction now claimed.

"The filing of a claim or demand as a prerequisite to a suit to recover taxes paid is a familiar provision of the revenue laws, compliance with which may be insisted upon by the defendant, whether the collector or the United States. Tucker v. Alexander, 275 U. S. 228; Maryland Casualty Co. v. United States, 251 U. S. 342, 353, 354; Kings County Savings Institution v. Blair, 116 U. S. 200; Nichols v. United States, 7 Wall. 122, 130.

"One object of such requirements is to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue, Nichols v. United States, supra, page 130, a purpose not accomplished with respect to the present demand by the bare declaration in respondent's claim that it was filed 'to protect all possible legal rights of the taxpayer.' The claim for refund, which section 1318 makes prerequisite to suit, obviously relates to the claim which may be asserted by the suit. Hence, quite apart from the provisions of the Regulation, the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded.

"The Court of Claims, in allowing recovery, relied upon Tucker v. Alexander, supra, and upon the fact that, at the time when respondent filed its return and its claim for re-

fund, the Treasury had consistently refused to allow deductions from gross income for exhaustion of patents. Consequently it held that the filing of a demand which was certain to be refused was a futile and unnecessary act. But in Tucker v. Alexander the right of the government to insist upon compliance with the statutory requirement was emphasized. Only because that right was recognized was it necessary to decide whether it could be waived. The court held that it could, and that in that case it had been waived by the stipulation of the collector filed in court. Here there [fol. 100] was no compliance with the statute nor was there a waiver of its condition, since the Commissioner had no knowledge of the claim and took no action with respect to it.

"The necessity for filing a claim such as the statute requires is not dispensed with because the claim may be rejected. It is the rejection which makes the suit necessary. An anticipated rejection of the claim which the statute contemplates, is not a ground for suspending its operation. Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and 'they mark the conditions of the claimant's right.' Rock Island R. R. Co. v. United States, 254 U. S. 141, 143. Compliance may be dispensed with by waiver, as an administrative act, Tucker v. Alexander, supra; but it is not within the judicial province to read out of the statute the requirement of its words. Rand v. United States, 249 U. S. 503, 510."

The appellant takes the position that in its original claim for refund, the Commissioner had called to his attention all the facts necessary to justify a reduction in its taxes on the basis of increased capital. However, it seems clear that the reference to the printing equipment presented in the original claim for refund was merely used as an illustration of the inability to determine the values of the invested capital in order to substantiate the right of the claimant to have its taxes assessed under Sections 327 and 328 of the Revenue Act of 1918. It was merely incidental. There is no particular similarity between a claim for refund based on a right of special assessment, and a claim for refund based on the right to have the invested capital increased. In fact, the appellant took the position, when its claim for refund was

originally presented, that the facts regarding its invested capital and value of property paid in for its stock, could not be determined, and for that reason, it insisted that its tax should be assessed as the average tax of representative corporations engaged in a like or similar trade or business. It may be that there is some confusion between the terms "facts" and "grounds" as used with reference to claims for tax refund. But the purpose in setting out facts is to advise the Commissioner of the grounds for tax reduction, and the original claim was predicated solely upon the right of special assessment. Any reference in the claim to the status of its printing equipment was merely referred to in [fol. 101] support of the taxpayer's right to special assessment. At least, one object of the requirement to set forth the facts in substantiation of the claim for refund is to advise the Commissioner so that there may be an orderly administration of the Revenue Department. United States v. Felt & Tarrant Mfg. Co., supra. If the appellant had in mind that it was entitled to a tax reduction on account of increased invested capital, there would have been no difficulty whatsoever in setting forth such a statement and asking for a reduction on such specific ground. The only purpose evidence by appellant in filing its claims was to obtain a special assessment in view of certain abnormal conditions and circumstances set forth in considerable detail in its brief in support of its claim. The Commission was asked to allow a special assessment. In view of these circumstances, no other claim was presented. The Commission's attention, before the claim was barred by the statute of limitations, was not called to any other claim for refund.

The Court, in the case of Mutual Life Ins. Co. of New York v. United States, 49 Fed. (2d) 662, seems to have had substantially this same question before it. On page 664 it said:

"Although the claim of August 2 stated certain facts with reference to the reserve funds at the beginning and end of the taxable year from which the 4 per cent of the mean of these reserve funds could be determined, they were stated, considered, and acted upon by the Commissioner for an entirely different purpose than that upon which the plaintiff now relies. No claim for refund of the nature as-

serted in this suit was ever made to the Commissioner until the application for reconsideration long after he had rejected the claim and after the statute of limitation for filing a claim had expired."

The claim for refund was prepared by the attorneys for appellant with considerable care. Great pains were taken in presenting to the Commissioner a voluminous brief in support of its contention that it was entitled to a special assessment. The Commissioner considered appellant's for some two years, and then formally denied it. If appellant intended to press a claim for refund before the statute of limitations expired on the grounds that its invested capital should be increased by certain printing equipment, there was no indication of any such intention prior to December [fol. 102] 13, 1926. The target at which appellant was aiming was the consent of the Commissioner to have its tax assessed according to Sections 327 and 328 of the Revenue Act of 1918. The fact that in aid of that objective certain facts appeared that might furnish grounds for a partial refund on an entirely different and inconsistent claim, could hardly be considered a preliminary requirement to a suit for such partial refund. Connell v. Hopkins, 43 Fed. (2d) 773; Lucas v. Pilliod Lumber Co., 281 U. S. 245; Maas & Waldstein Co. v. United States, 283 U. S. 583.

In accordance with the views herein expressed, the judgment of the lower court is affirmed.

[fol. 103] In United States Circuit Court of Appeals, Eighth Circuit

No. 9415

Bemis Bro. Bag Company, a Corporation, Appellant,

vs.

United States of America

Appeal from the District Court of the United States for the Eastern District of Missouri

Judgment—September 1, 1932

This cause came on to be heard on the transcript of the record from the District Court of the United States for the

Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed, without costs to either party in this Court.

[fol. 104] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

PETITION OF BEMIS BRO. BAG COMPANY FOR REHEARING—Filed Sept. 19, 1932

Bemis Bro. Bag Company, appellant, files this, its petition for rehearing, and presents the following:

1

This Court is in error in its statement of facts as follows:

(Page 6:) "It is clear that the claim for special assessment for the years 1918 and 1919 was rejected by these letters. On December 13, 1926, after the Statute of Limitations had run on these claims, the appellant sent to the Commissioner a communication referring to the rejection," etc.

(Page 8:) "The letter of December 13, 1926, from the appellant to the Commissioner, was written after the claims filed in 1924 were denied and after the Statute of Limitations had expired."

[fol. 105] This statement is repeated several times in substance.

This finding is the substantial basis of the result arrived at by the Court. Without it the Court's judgment must have been for the appellant.

The Court finds that the claims for refund were rejected solely upon the basis of a statement in the letters that the claims for refund will be rejected and by this finding concludes the case. The rejection of a claim for refund usually requires more than the mere writing of a letter. The official order must be entered in the records of the Treasury and the Collector is notified (U. S. v. Michel, 282 U. S. 656; Savannah Bank & Trust Co. v. Groves, U. S. Court of

Claims, May 31, 1932). The letters themselves disclose that something further was to be done before the rejection was effective.

A. The finding is contrary to all the facts in the case, as follows:

(a) This finding is directly contrary to the stipulation of facts. If the claims were rejected when these letters were written in November, 1926, then the suit filed in 1929 was barred by the Statute of Limitations limiting the time for filing suits to two years after the rejection of the claim (26 U. S. C. A., Par. 156). The stipulation that there is no defense to the suit if the claims for refund were sufficient, is directly contrary to the Court's finding that the claims for refund were rejected before December, 1926, when the amendments were filed.

(b) This finding is directly contrary to the presumption of facts. The date of rejection of the claims by the Commissioner of Internal Revenue was in the exclusive possession of defendant. If they were rejected, when the Court finds they were rejected, that fact was a complete defense in this case (26 U. S. C. A., Par. 156). The failure of defendant to produce the evidence should raise a conclusive presumption that the facts are no defense (Despard v. Pearcy, 65 W. Va. 140; Wilmer v. Placide, 119 Md. 49; 22 C. J. Evidence, Sections 53, 54). The presumption is made a certainty by defendant's complete failure at every stage of this case (including this appeal) to insist upon the perfect defense, which it had, if the facts found by the Court were true.

(c) The conduct of the Commissioner subsequent to these letters in the hearing and examination of the amendments to the claims is evidence that the intention to reject the [fol. 106] claims for refund was not put in execution and that they were not actually previously rejected (McKesson & Robbins, Inc., v. Edwards, 57 Fed. [2d] 147).

(d) The letter from the Commissioner of Internal Revenue, dated December 17, 1927, also quoted by the Court, states:

"Your claim for the refunding of $1,270,907.97 for 1918 * * * *will be rejected* in full in the next schedule to be approved by the Commissioner." (Emphasis ours.)

If the claim for 1918 had been rejected in November, 1926, it could not be rejected on December 17, 1927. It would be impossible to reject a claim already rejected.

(e) The letter by which the Court finds the 1918 claim was rejected included in identical terms the 1917 claim. But it appears in evidence that the 1917 claim was subsequently allowed and paid (Letter of December 17, 1927, Exhibit H). This is evidence that neither claim was rejected by the previous letter, because, as the Court says, the Commissioner had no power to waive the Statute of Limitations, which would have barred the refund by him for 1917 if he had rejected that claim a year previously.

(f) The letter of October 30, 1926 (Exhibit C), by which the Court finds the 1919 claim was rejected, itself states that the Collector will not be notified for thirty days. This, according to departmental procedure, withheld all action during that period to afford an opportunity to protest.

There is no evidence in the case to support this finding, and this finding is the substantial basis of the Court's conclusion, as follows:

On page 8 of its opinion the Court says:

"The letter of December 13, 1926, from the appellant to the Commissioner was written after the claims filed in 1924 were denied and after the Statute of Limitations had expired. The only question, therefore, presented to this Court is whether or not the claims for refund filed by appellant on February 29, 1924, and December 12, 1924, were sufficient, under the law, to be the required preliminary for the maintenance of this action, which is based on overpayment of its taxes for 1918 and 1919 on the grounds that its invested capital is a larger amount than was set forth in its return for those years."

[fol. 107] The Court, therefore, disregards the amendments to the claims. It could not have held that a proper amendment filed before the claims were rejected was barred by the Statute of Limitations. Under every authority such an amendment dates back to and is part of the original claim.

B. By the foregoing error in the facts, the Court is led into erroneous analysis of this entire question. The Court quotes from the case of Mutual Life Insurance Company of New York v. U. S., 40 Fed. (2d) 662.

If the quotation is offered on the proposition that the amendments to the claim are not to be considered, it is in point only under the misapprehension of facts above referred to.

That case holds only that a suit cannot be maintained for relief which was never sought from the Commissioner of Internal Revenue at a time when he still has jurisdiction of the claim. The amendments asking such relief were not filed in that case until "*long after he rejected the claims.*" A suit on a claim is an appeal from the Commissioner's rejection of the claim, and the principle applied is that the parties on appeal "are restricted to the theory on which a cause was prosecuted or defended in the court below" (3 C. J., p. 718). That principle has no application in this case, where the amendments were offered before the claims for refund were rejected and passed upon by the Commissioner.

2

The Court's conclusion in this case is directly contrary to the judgment of the United States courts of other districts in the following cases: McKesson & Robbins, Inc., v. Edwards, supra; Factors and Finance Co. v. U. S., 56 Fed. (2d) 902. The opinion makes no reference to said decisions.

3

The Court erred in holding that a claim for refund is not sufficient when it sets forth the facts concerning the matter, because of which a refund is sought, merely because it seeks special assessment by virtue of such facts. In the case of Felt & Tarrant v. U. S., 283 U. S. 289, quoted from by the Court and stated to be similar, no facts were stated. This holding is contrary to the ruling of substantially every other appellate court which has considered similar questions. (See cases cited in original brief.)

[fol. 108] For the foregoing reasons it is respectfully urged that this petition for rehearing be granted, and that the judgment of the District Court be, upon further consideration, reversed.

Respectfully submitted.

Spencer M. Thomas, Stanley S. Waite, Abraham Lowenhaupt, Counsel for Bemis Bro. Bag Company.

We, Spencer M. Thomas, Stanley S. Waite and Abraham Lowenhaupt, counsel for the above-named Bemis Bro. Bag Company, do hereby certify that the foregoing petition for rehearing in this cause is presented in good faith and not for delay.

Spencer M. Thomas, Stanley S. Waite, Abraham Lowenhaupt, Counsel for Bemis Bro. Bag Company.

[File endorsement omitted.]

[fol. 109] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—September 30, 1932

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellant.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

In United States Circuit Court of Appeals

Petition for Stay of Mandate—Filed Oct. 8, 1932

Spencer M. Thomas, Stanley S. Waite and Abraham Lowenhaupt, as attorneys for the above named Bemis Bro. Bag Company, respectfully petition the Court for an order granting an additional stay of the issuance of the mandate to the District Court of the United States for the Eastern District of Missouri.

Your petitioners request that said order be issued to enable said petitioners to prepare the necessary papers in connection with an application to the Supreme Court of the United States for a writ of certiorari.

Spencer M. Thomas, Stanley S. Waite, Abraham Lowenhaupt, Attorneys for Bemis Bro. Bag Company, Appellant.

[File endorsement omitted.]

[fol. 110] In United States Circuit Court of Appeals

Order Staying Issuance of Mandate—October 18, 1932

On consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 111] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 112] Supreme Court of the United States

Order Allowing Certiorari—Filed January 23, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,212. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 515. Bemis Bro. Bag Company, petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed November 19, 1932. File No. 37,212.

FILE COPY

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CHARLES ELMORE CR
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 515

BEMIS BRO. BAG COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT.

SPENCER M. THOMAS,
STANLEY S. WAITE,
ABRAHAM LOWENHAUPT,
Attorneys for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No.....

BEMIS BRO. BAG COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

The petition of Bemis Bro. Bag Company respectfully shows to the Court:

Bemis Bro. Bag Company, petitioner herein, filed suit in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, seeking the recovery of income taxes paid for 1918 and 1919. That Court rendered judgment in favor of the defendant, which, upon appeal, was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit.

Certified copy of the entire record in said case in said Circuit Court of Appeals is hereby furnished and made a part of this application, in compliance with rule 35 of this Honorable Court. Your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals in this case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of Section 240 (a), Judicial Code (Title 28, U. S. C., Sec. 347 [a]).

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner filed its returns of income and invested capital for the years 1918 and 1919 in due time and paid the profits taxes and income taxes shown by such returns respectively at the quarterly due dates in 1919 and 1920. It paid an additional assessment of $98,549.28 for the year 1918 on June 30, 1920, and the balance thereof, $695.70, was paid in 1922 by a credit. It paid on December 16, 1920, an additional assessment for 1919 amounting to $34,630.31 (R. 10-11).

Petitioner overpaid its said taxes for the year 1918 in the amount of $14,054.18, and for the year 1919 in the amount of $9,073.15. The Commissioner of Internal Revenue refused to refund these overpayments because he al-

leged the claims for refund filed within due time were not sufficient (R. 14, 74).

On February 29, 1924, petitioner duly filed a claim for refund of part of the taxes paid for 1918 (R. 11), and on December 12, 1924, it filed a similar claim for refund for 1919 (R. 12). **Both claims were timely.**

The claims for refund filed for both years were identical, so far as the matter in controversy here is concerned (R. 26). They alleged that the excess profits and war profits taxes for 1918 and the excess profits tax for 1919 should be determined in the manner provided in Section 328 of the Revenue Act of 1918 (Act February 24, 1919, C. 18, Sec. 328). In support of said allegation the claims for refund set out certain facts concerning petitioner's invested capital, including all of the facts upon the basis of which the Commissioner of Internal Revenue ultimately found the overpayment and the overassessment, being the same facts upon which recovery was sought in this suit (R. 37-38).

On October 30, 1926, the Commissioner of Internal Revenue advised petitioner by letter that "the claim for 1919 will be rejected in full upon the next schadule" (R. 57), and on November 27, 1926, he advised petitioner that "the claim for 1918 will be rejected in full and the Collector of Internal Revenue will be officially notified" (R. 58). At the time said letters were written, being approximately two years after the claims were filed, the Statute of Limitations barred the filing of a new claim.

On December 13, 1926, petitioner filed an amendment to its original claims, by which it asked for additional invested capital under Section 301 of the Revenue Act of 1918, on account of **the very same facts alleged in its original claims**, but which in its original claims were urged as a basis for its claim to the right to assessment of its excess profits taxes under section 328 (R. 59).

After he received said amendment the Commissioner of Internal Revenue reconsidered his previous ruling, proposing to reject said claims, held a conference with petitioner's representatives and caused its books to be investigated by a revenue agent in St. Louis upon the matters involved in said claims, recalculated the taxes and found the overpayments stated above (R. 12, 13). Under date of December 17, 1927, he sent a letter to petitioner (R. 69), in which he stated the said overpayments, and in which he further stated (R. 78):

> "Inasmuch as computation of your tax liability for 1918 and 1919 under the provisions of Sections 327 and 328 of the Revenue Act of 1918 is denied and your claim for the refunding of $1,270,907.97 for 1918 is confined to that point, **it will be rejected in full in the next schedule to be approved by the Commissioner.**
>
> "Your claim for the computation of your tax liability for 1919 under the provisions of sections 327 and 328 has already been rejected."

The Commissioner of Internal Revenue gave no consideration or effect to said amendment.

This suit was begun in the District Court on January 2, 1929 (R. 2).

All of the facts were stipulated at the trial in the District Court, and it was further stipulated as follows (Stip., Par. XVIII, R. 14):

> "If the plaintiff, within the time provided by law, filed claims for refund for the years 1918 and 1919, respectively, which, under the law, were sufficient to be the required preliminary for the maintenance of this action on that ground, above stated, then plaintiff will be entitled to judgment for the year 1918 in the amount of $14,054.18, with interest, and for the year 1919 in the amount of $9,073.15, with interest.
>
> "If the claims for refund filed by the plaintiff for the years 1918 and 1919, respectively, were not sufficient under the law to be the required preliminary for the maintenance of this action on that ground, then defendant will be entitled to judgment dismissing this action."

If the amendment to the claims for refund filed December 13, 1926, must be considered, then it cannot be doubted and is not questioned that the claims for refund as so amended were sufficient as the required preliminary for the maintenance of this action on the ground alleged in the petition.

The judgment of the United States Circuit Court of Appeals rests upon two conclusions set forth in the Court's opinion, which are as follows:

(a) The Court ruled that the claims for refund were rejected by the Commissioner of Internal Revenue by his letters dated October 30, 1926, and November 27, 1926, and that the amendment filed December 13, 1926, could not be considered, because it was offered after the claims were rejected (R. 96).

(b) The Court ruled that, although the original claims for refund set forth all of the facts which are alleged in the petition filed in the District Court and which are the basis of the action, the claims were not sufficient to sustain the suit because these facts were set forth in the claims in support of a prayer for assessment under said Section 328 of the Revenue Act of 1918, whereas the overpayment was found under Section 301 of said act (R. 98).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Your petitioner assigns the following reasons why this petition for writ of certiorari should be granted:

(1) Important questions affecting the administration of the National Revenue Acts have been decided in this case erroneously and contrary to the judgment of the other Federal Courts. The questions have never been directly decided by this Court. The nature of the questions is as follows:

(a) The tax was paid more than five years before the

suit was begun, so that, unless the suit was begun within two years after the claims for refund were rejected, it was begun too late (U. S. C. A., Title 26, Sec. 156). The parties stipulated that the suit was begun in time and, therefore, that the claims for refund were not rejected until after January 2, 1927—two years before the suit was begun. The Court, contrary to the stipulation and the Commissioner's statement (quoted above), in his letter dated December 17, 1927, ruled that the claims were rejected, respectively, by his letters of October 30th, 1926, and November 27th, 1926, and, therefore, an amendment filed on December 13th, 1926, could not be considered. The Court ruled that the claims for refund were rejected by said letters, stating a purpose to reject them on the next schedule, irrespective of when they were actually rejected on such schedule.

The Court, in effect, ruled that the notice by the Commissioner of Internal Revenue that he will reject a claim for refund constitutes in itself a final rejection of such claim beyond recall by the Commissioner of Internal Revenue.

(b) The Court ruled that recovery may not be had of an overpayment of taxes, disclosed by and resulting from the facts stated in a claim for refund, if such facts were stated in such claim for refund as the basis for the calculation of an overpayment under the wrong section of the statute.

(2) The rulings of the Court in this case are of national importance, not only because they conflict with the final decisions of the other Federal Appellate Courts and thereby render the uniform application of the National Revenue Laws impossible; but also because, if they are applied by the administrators of the law, they will clog the administration with improper technicalities and will burden the courts with unnecessary litigation.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, Eighth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 9415, Bemis Bro. Bag Company, appellant, v. United States of America, appellee, and that the said judgment of the United States Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

BEMIS BRO. BAG COMPANY,
By SPENCER M. THOMAS,
STANLEY S. WAITE,
ABRAHAM LOWENHAUPT,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No.....

BEMIS BRO. BAG COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals, Eighth Circuit, is reported under the title Bemis Bro. Bag Company v. United States, 60 Fed. (2) 944 to 950 and is printed on pages 90 to 100 of the record.

II.

JURISDICTION.

The judgment of the Court of Appeals for review was entered September 1, 1932 (R. 103). The petitioner thereafter filed a petition for rehearing on September 19, 1932 (R. 108), which was denied by order entered on September 30, 1932 (R. 109).

This is a civil suit against the United States for the recovery of an overpayment of income taxes, and the writ of certiorari is sought directed to the United States Circuit Court of Appeals, Eighth Circuit.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Title 28, U. S. C. A., Sec. 341 [a]). The following cases sustain the jurisdiction of this Court: U. S. v. Felt & Tarrant Mfg. Co., 283 U. S. 269; Tucker v. Alexander, 275 U. S. 228.

III.

STATEMENT OF FACTS.

A full statement of the facts is given in the petition for the writ of certiorari under heading "A. Summary Statement of the Matter Involved." For the sake of brevity it is not repeated here.

IV.

SPECIFICATION OF ERRORS.

The decision of the Court is erroneous and is contrary to the decisions of the other federal courts in the following findings and rulings:

(a) That the Commissioner of Internal Revenue rejected these claims for refund respectively by his letter of October 30th and November 27, 1926, stating that the claims will be rejected, and, therefore, an amendment filed on December 13, 1926, could not be considered.

(b) That recovery may not be had of an overpayment of taxes disclosed by and resulting from the facts stated in a claim for refund because such facts were stated in such claim for refund as the basis for the calculation of an overpayment under the wrong section of the statute.

V.

ARGUMENT.

Summary of the Argument.

The Court, in error, ruled that the letters of the Commissioner of Internal Revenue, dated October 30 and November 27, 1926, stating that petitioner's claims for refund will be rejected, were a rejection of such claim. The Commissioner did not so regard them, and his subsequent con-

duct is inconsistent with a previous rejection. Moreover, the parties in the stipulation of the facts and the issues agreed that the plaintiff should recover if its claims for refund were sufficient, when, if the claims were rejected by and at the date of said letters, the plaintiff would not have been entitled to recover, whether the claims were sufficient or not. The amendment to the claims filed December 13, 1926, was proper and sufficient.

Section 3226, Rev. Stat. (U. S. C., Title 26, Sec. 156);
Treasury Decision 4235;
U. S. v. Michel, 282 U. S. 676;
Savannah Bank & Trust Co. v. U. S., 58 Fed. (2d) 1068;
McKesson & Robbins v. Edwards, 57 Fed. (2d) 147;
Prentiss & Co. v. U. S., 57 Fed. (2d) 676;
Factors & Finance Corp. v. U. S., 56 Fed. (2d) 902;
Memphis Cotton Oil Co. v. U. S., 59 Fed. (2d) 676.

The Court erred in ruling that upon a claim for refund stating the facts, entitling the claimant to additional invested capital, the claimant is not entitled to recover an overpayment resulting from such additional invested capital, because in the claim for refund such facts were stated in support of a prayer for assessment under Section 328 of the Revenue Act of 1918.

Prentiss & Co. v. U. S., 57 Fed. (2d) 676;
Warner v. Walsh, 24 Fed. (2d) 449;
Paul Jones & Co. v. Lucas, 33 Fed. (2d) 907;

Union Trust Company v. McCaughn, 24 Fed. (2d) 459;
Wunderle v. McCaughn, 38 Fed. (2d), l. c. 260;
Dreyfus Dry Goods Company v. Lyons, 24 Fed. (2d) 29;
Prentiss v. U. S., 46 Fed. (2d), l. c. 160;
Tucker v. Alexander, 275 U. S. 228;
U. S. v. Felt & Tarrant Mfg. Co., 283 U. S. 269;
Treasury Regulations 65, Art. 1306.

Point A.

The Court erred in finding and ruling, contrary to the decisions of the other federal courts, that the Commissioner of Internal Revenue rejected these claims for refund, respectively, on October 30 and November 27, 1926, and therefore that an amendment filed on December 13, 1926, could not be considered.

The parties stipulated the dates when the taxes were paid and when the claims for refund were filed, showing they were filed in due time, to wit, within four years after the taxes were paid (Sec. 284, Revenue Act 1926 [Title 26 U. S. C., Sec. 1065]).

Section 3226, Revised Statutes, as amended by the Revenue Act of 1926 (Title 26 U. S. C., Sec. 156), reads as follows:

> "No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed

or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

The suit was begun in the United States District Court on January 2, 1929.

The statute quoted above establishes or fixes two conditions upon a suit material for consideration here: (1) A claim for refund must be filed with the Commissioner, and, as construed by the courts, the suit must be based on the same grounds or causes of refundment as are set out in the claim for refund, and (2) the suit must be begun within two years after the Commissioner has disallowed or rejected the claim.

The parties in this case stipulated that the plaintiff (petitioner) is entitled to recover if in due time it filed a claim for refund sufficient to be the required preliminary for the maintenance of this action. As stated, it is not questioned that the claims were filed in due time.

If the suit begun on January 2, 1929, was not begun within two years after the claims were rejected, then it made no difference whether the claims were originally sufficient or not. The suit, in that event, was brought too late. By this stipulation the parties agreed that the time when the claims for refund were **rejected** was not material —that is, it was, in effect, stipulated that the claims were rejected after January 2, 1927.

The Court ruled as follows (R. 96):

> "The letter of December 13, 1926, from the appellant to the Commissioner (this is the amendment) was written **after the claims filed for 1924 were denied** and after the Statute of Limitations had expired. The only question, **therefore**, presented to this Court is whether or not the claims for refund filed by appellant on February 29, 1924, and December 13, 1924, were sufficient under the law to be the required preliminary for the maintenance of this action, which is based on overpayment of its taxes for 1918 and 1919 on the grounds that its invested capital is a larger amount than was set forth in its returns for those years." (Emphasis ours.)

The Court ruled in the above-quoted statement that the

claims for refund were denied or rejected by the Commissioner of Internal Revenue by his letters dated, respectively, October 30, 1926, and November 27, 1926, in which the Commissioner stated that the claims for refund will be rejected, and for that reason the amendment filed December 13, 1926, should not be considered. If said amendment was filed before the claims were rejected, there is no question of the right of petitioner to recover.

The Court, in its opinion, called attention to the fact that after petitioner's letter of December 13, 1926, was received by the Commissioner of Internal Revenue (after the Court says the claims were denied) he arranged and held a conference with petitioner, requested additional information, which was furnished him in letter dated April 12, 1927, recalculated the tax-giving effect in invested capital to the facts disclosed upon the claims for refund, found the overassessments sued for and refused to refund them for the reasons previously stated. The Court also recites in its opinion that in the letter dated December 17, 1927, the Commissioner also makes the statement "that your claim will be rejected in full in the next schedule to be approved by the Commissioner."

It is apparent that the Commissioner believed that he still had jurisdiction of the claims. Even in his letter of December 17, 1927, he states that the claims are then disallowed only because they were originally not sufficient. The date of the rejection of the claims never entered into the case until the Court injected it in its opinion.

The effect of the Court's ruling is that the Commissioner's letter to the taxpayer notifying him that he will reject a claim is per se a final rejection of the claim, which the Commissioner is powerless to revoke.

The Court uses this finding in a left-handed manner. It does not say the suit was begun more than two years later, and was, therefore, too late. It says only that the amendment to the claim filed thereafter is not to be considered.

The ruling of the Court is contrary to the decisions of the Treasury Department. Its regulations (T. D. 4235) provide as follows:

> "Any claim which has been disallowed will be reconsidered and allowed at any time prior to the expiration of the Statute of Limitations for bringing suit if it clearly appears that the claim should be allowed on the merits. No reopening or application for reopening will extend the period within which suit must be brought. Nor will the reconsideration of the claim be considered as a reopening."

This treasury decision in the first subdivision provides even that the claim may be reopened under the circumstances stated therein after the time for bringing suit has expired.

The decision in this respect is contrary to the implications in the case of United States v. Michel, 282 U. S. 656, wherein the Court says:

> "The Commissioner of Internal Revenue, by letter dated August 17, 1925, advised Michel that his claim would be rejected, and that the rejection would appear on the next schedule to be approved by him. The claim was rejected on September 2nd. The Commissioner, on April 2, 1925, sent a like letter to Krieger and his claim was rejected April 20th."

This Court in the above-mentioned case did not hold that the Commissioner's letter was in itself a full and final rejection of the claim.

The ruling of the Court of Appeals is also contrary to the following decisions:

Savannah Bank & Trust Company v. U. S. (Ct. Cls.), 58 Fed. (2d) 1068: In this case the Court of Claims held that a claim for refund was not rejected by a letter from the Commissioner, almost identical with those involved in this case, but that it was rejected when it was placed on the schedule of rejections.

The ruling of the Court is directly contrary to the decisions of the United States Circuit Court of Appeals, Second Circuit, in the following cases:

> McKesson & Robbins v. Edwards, 57 Fed. (2) 147; Prentiss & Co. v. U. S., 57 Fed. (2) 676.

These cases are so identical on the facts with the present case, and the entire opinions are so apt, that a quotation

from neither of them presents the complete conflict with the present case and we are fearful that to copy the entire opinions would unduly extend this memorandum. We ask the Court particularly to examine these two cases.

In the case of Factors & Finance Corporation v. United States, 56 Fed. (2d) 902, the Court of Claims of the United States held that an original claim for refund could be amended after the Statute of Limitations barred the filing of a new claim when the original claim was a mere blanket claim.

To the same effect Memphis Cotton Oil Co. v. United States, 59 Fed. (2d) 276.

The ruling of the Court in this case is, without doubt, contrary to the rulings in all other Federal Courts which have passed upon the question.

The effect of the Court's ruling in this case is that the Commissioner's letter notifying a taxpayer that he (the Commissioner) will reject a claim for refund is, in itself and alone, a final rejection of such claim (without any actual rejection), which the Commissioner is powerless to revoke in the event the Statute of Limitations then bars the filing of a claim. In such cases his letter is itself his rejection of the claims, although in his ordinary procedure he does not regard the claim as rejected until it is scheduled for rejection. He may not thereafter consider evidence or argument which may change his conclusions upon

the facts or grounds presented to him by the claim. He may not reconsider his ruling at all. Suit must be filed and must go to judgment in order to set aside and change the ruling, even though the Commissioner admits it to be wrong.

Point B.

The Court erred in finding and ruling that recovery may not be had of an overpayment of taxes, disclosed by and resulting from the facts stated in a claim for refund, because such facts were stated in such claim for refund as the bases for the calculation of an overpayment under the wrong section of the statute.

Section 301 of the Revenue Act of 1918 (Act Feb. 24, 1919) imposed an excess profits tax and war profits tax equal to certain percentages of the income, increasing as the income exceeded named percentages of the invested capital. Invested capital was defined by Section 326 of the act. Section 327 provided (among other conditions) that where the Commissioner is unable to determine invested capital under Section 326, the excess profits and war profits tax should be calculated in the manner provided in Section 328, roughly by comparison to the tax upon the income of representative corporations in the same line of business. Copies of said sections of the Revenue Act are printed in appendix hereto.

The claims for refund in this case set out the facts con-

cerning the two items of invested capital which had been omitted from the taxpayer's original returns and which the Commissioner added to its invested capital, resulting in his finding of an overpayment of the tax calculated under Section 301. These are the same facts set out in the petition in this case. The claims set out these facts to disclose that the invested capital as previously calculated was insufficient and that with the other facts set out invested capital could not be determined. Because the facts were set out in the claims for refund in this manner, the Court ruled that recovery could not be had in this suit.

This ruling is contrary to the ruling of all other Federal Courts.

The Commissioner's regulations required only that a taxpayer in a claim for refund set out the facts (Art. 1306, Regulations 65).

In Prentiss & Co. v. United States, 57 Fed., l. c. 678, the Court said:

> "The defendant does not dispute the undervaluation of the real estate. The claim filed for refund of taxes paid for the calendar year 1918 is disputed because of its insufficiency and inadequacy to support this claim for additional invested capital by reason of such undervaluation. The plaintiff, in its claim for refund, asked for its allowance, stating that 'it is entitled to relief under Sections 327, 328 of the 1918 Act.' The relief to be granted under these sections concededly

is not similar to that which is now sought in this suit. Section 1113 of the Revenue Act of 1926 (44 Stat. 116, now Section 3226 of the Revised Statutes, as amended [26 U. S. C. A., Par. 156]) requires that the claim which is presented must be stated in the application to the Commissioner, and the taxpayer cannot base a recovery in the court upon an entirely different and distinct ground from that presented to the Commissioner (United States v. Felt & Tarrant Mfg. Co., 283 U. S. 269, 51 S. Ct. 376, 75 L. Ed. 1025; Lewis A. Crossett Co. v. United States, 50 Fed. [2d] 292 [Ct. Cl.]). The claim for refund made no reference to undervaluation of real estate, and no reference was made to it until after the claim was rejected by letter of July 16, 1925. However, the Commissioner's action did not appear on the rejection schedule until September 3, 1926. On April 12, 1926, the plaintiff filed an additional brief which is, in effect, an amended claim. Its first brief had been filed before rejection. There was a reconsideration by the Commissioner of the claim after rejection, and it was then urged that there had been an undervaluation of real estate which should have been taken into consideration in determining invested capital. This was sufficient upon which to base a claim under Section 326 as to the allowance for real estate increases. This claim was reconsidered and disallowed. It was sufficient to advise the Commissioner while the claim was under consideration of the reasons the plaintiff put forth then and now for its allowance."

The claim for refund as originally filed in that case was based on section 328, as in this case, and the case was less

meritorious than this case because **the claim did not set out the items of invested capital, as was done in this case.**

In the following cases claims for refund which set out the facts, either with an improper claim for relief or with no claim for relief, were held sufficient:

Warner v. Walsh, 24 Fed. (2d) 449;
Paul Jones & Co. v. Lucas, 33 Fed. (2d) 907;
Union Trust Company v. McCaughn, 24 Fed. (2d) 459;
Wunderle v. McCaughn, 38 Fed. (2d), l. c. 260;
Dreyfus Dry Goods Company v. Lyons, 24 Fed. (2d) 29;
Prentiss v. U. S., 46 Fed. (2d), l. c. 160.

In the cases of Tucker v. Alexander, 275 U. S. 228, and U. S. v. Felt & Tarrant Mfg. Co., 283 U. S. 269, the Court states that the claims did not set out any facts, from which it may be implied that the judgment would have been otherwise if the facts had been stated in the claims.

The Court of Appeals, in its opinion in this case (R. 99), says that the question involved here was decided in the case of Mutual Life Insurance Company of New York v. U. S., 49 F. (2d) 662. The reliance upon that case indicates that the Court misconceived the question involved in this case. In that case it was held that a claim relying upon the statute (by an insurance company for an additional amount, on account of the statutory right to a deduction of 4 per cent on the mean of the reserve) was not

a sufficient claim upon which to found a suit based upon the unconstitutionality of the statute determined in National Life Insurance Company v. United States, 277 U. S. 508, decided long after the claim for refund had been rejected. Of course, in that case the facts, upon which the suit was brought, did not appear in the claim for refund. A claim for an additional deduction **under the statute** can in no sense be regarded as a claim **against the constitutionality of the statutory levy.** The unconstitutionality of the statute is a fact which, under all the rulings of all courts, must be set out at the very beginning of any proceeding which intends to rely on such fact.

If the ruling of the Court of Appeals in this case is sustained, then a taxpayer will be unable to present a claim for refund. The statute becomes, in the words of this Court in the case of Tucker v. Alexander, supra, a mere trap for the unwary. Claims for refund must not only set out the facts with meticulous care, but they must also set out and claim with meticulous care the particular relief, under the statute, resulting from such facts. It is not sufficient that the Commissioner of Internal Revenue knows and understands how the facts should be applied and that he calculate the tax under a proper application of the facts. He may not make the refund, if the claim states the facts under an improper claim of right. If this is necessary, then taxpayers will be put to burdens of expense in the employment of experts in tax matters, which will make it exceedingly burdensome to secure their rights,

even from the United States Government—destructive of confidence in and candor with the tax administrators.

CONCLUSION.

It is therefore respectfully submitted that this case is one clearly for the exercise by this Court of its supervisory powers in order that the administration of the Internal Revenue Laws throughout the United States may be made uniform, and also that taxpayers may deal with the Government of the United States with confidence and decency; and that to such end a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals, Eighth Circuit, and finally reverse it.

SPENCER M. THOMAS,
STANLEY S. WAITE,
ABRAHAM LOWENHAUPT,
Counsel for Petitioner.

APPENDIX.

(Act February 24, 1919, C. 18.)

Revenue Act of 1918.

Section 301.

(a) That, in lieu of the tax imposed by Title II of the Revenue Act of 1917, but in addition to the other taxes imposed by this Act, there shall be levied, collected and paid for the taxable year 1918 upon the net income of every corporation a tax equal to the sum of the following:

First Bracket.

30 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital.

Second Bracket.

65 per centum of the amount of the net income in excess of 20 per centum of the invested capital.

Third Bracket.

The sum, if any, by which 80 per centum of the amount of the net income in excess of the war-profits credit (determined under section 311) exceeds the amount of the tax computed under the first and second brackets.

(b) For the taxable year 1919 and each taxable year thereafter there shall be levied, collected and paid upon

the net income of every corporation (except corporations taxable under subdivision [c] of this section) a tax equal to the sum of the following:

First Bracket.

20 per centum of the amount of the net income in excess of the excess-profits credit (determined under section 312) and not in excess of 20 per centum of the invested capital.

Second Bracket.

40 per centum of the amount of the net income in excess of 20 per centum of the invested capital.

Section 327.

That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326.

(b) In the case of a foreign corporation. (See Par. 830 and Par. 852.)

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively.

(d) Where, upon application by the corporation, the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of title II) consists of gains, profits, commissions, or other income derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

Section 328.

(a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the

case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profit per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 515.

BEMIS BRO. BAG COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

SUPPLEMENTAL BRIEF FOR PETITIONER.

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Under the decisions of this Court in United States v. Factors & Finance Company (No. 141), United States v. Memphis Cotton Oil Company (No. 308) and United States v. Henry Prentiss & Company (No. 234), January 9th, Last, the Judgment of the Circuit Court of Appeals in This Case Should Be Reversed.

I.

The Amendment Offered Was a Proper Amendment.

Section 327 of the Revenue Act of 1918 reads, in part:

> "That in the following cases the tax shall be determined as provided in section 328:
>
> "(a) Where the Commissioner is unable to determine the invested capital as provided in section 326.
>
> "(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation exceptional hardship, etc."

The claims for refund in this case rested upon paragraph (a), quoted above—that is, it was alleged that the Commissioner was *unable to determine the invested capital* (R. 34 to 41, incl.), and in support of that statement *the special items of invested capital, omitted in the audit of the taxpayer's return and claimed as such in the amendment, were set out in detail* (R. 37 and 38). The memorandum filed on the claim for 1917 under Section 210, Rev. Act 1917, was attached to and made a part of the claims for 1918 and 1919 (R. 31).

In the Prentiss case the original claim for refund rested upon subdivision (d) and no facts were alleged. This difference distinguishes the propriety of the amendment of-

fered in that case from this case and this difference is the source of the different rulings in the Factors & Finance Company case and the Prentiss case.

In the Prentiss case this Court said:

> "The act of the Commissioner of Internal Revenue in granting or refusing special assessment under Section 327 (d) of the Act of 1918 is discretionary and administrative, not subject to be challenged in any court, at least in the absence of fraud and other irregularities. * * * If this amendment is permissible, a request for the exercise of a discretionary jurisdiction will have been turned after the running of the statute * * * into a claim of error of law or fact and hence into a controversy within the jurisdiction of a court. What at the beginning was nonjusticiable with exceptions few and narrow (Williamsport Company v. U. S., supra) will have become justiciable at the end.
>
> "An amendment so far-reaching, a metamorphosis so complete, may well be thought to destroy the identity of the claim or cause of action if the analogies of pleading in a lawsuit are to govern our decision. * * * A cause of action alleging as a grievance that there has been a deviation from a rule of law or the breach of a legal duty in the collection of a tax is far apart from an appeal to an administrative officer to abandon the normal rule or method and substitute another, the substitution being dependent upon administrative discretion. * * * A demand for special assessment in accordance with Section 327 (d) of the Statute of 1918 is not a challenge to any act of the Commissioner in the valuation of invested capital.

On the contrary, the valuation of invested capital is irrelevant if the special method is accepted. * * * Let the new method be adopted and the value of the invested capital ceases to be a factor in the process. * * * The fact remains, however, that the grievance does not grow out of the failure of assessors to value invested capital truly according to the statute. * * *

"A claim or cause of action will be ill-defined for the purpose of an administrative remedy if the definition gives no heed to the understanding or conduct of administrative officers. * * * The presentation of such a claim, unlike the presentation of a claim of error in fact or law, does not suggest the need for a new and general audit of assets and liabilities. The two proceedings, alike in form and consequences, are essentially diverse. By the very terms of the statute (Section 327 [d]), special assessment is the outcome of a special application; it is made on motion of the taxpayer. A revision for error of fact or law, on the other hand, may be made by the Commissioner on his own motion, and indeed is commonly made, for it is incidental to his general duty to audit the accounts.

"The conclusion derived from the analogies of pleadings in a lawsuit is thus seen to be confirmed by the probabilities, if not the certainties, of administrative practice. If this is not enough, however, there is confirmation from other sources. In the pages of this record we find convincing evidence that the understanding of the parties was that the claim for a special assessment was to exclude any claim for the revision of the value of the capital, and that no such claim would be pressed, at all events while the claim for a new method of assessment was alive and undeter-

mined. We have seen that in May, 1924, the Commissioner of Internal Revenue gave notice to the taxpayer that there could be no consideration of the prayer for relief under sections 327 and 328 of the applicable statute 'until statutory net income and invested capital are definitely determined.' * * * In these circumstances its conduct in proceeding with its application for a special assessment was a tacit assent to the condition imposed by the Commissioner and an abandonment of any objection that capital and income had been erroneously valued if valuation was to be ascertained according to the normal method. * * * At least its assent is equivalent to an agreement that the claim for a special assessment shall be deemed to be a distinct one from that for a revision of the value."

Every basis of the ruling in the Prentiss case is lacking in this case. *The opposite of every statement quoted above is true in this case and the ruling in this case should be the converse of the ruling in the Prentiss case.*

In this case the claim asserted that the invested capital as theretofore allowed under the normal method had not been properly determined. There was not only no assent to the invested capital, as determined, but a direct challenge of the allowance of invested capital by the normal method.

The claim in this case was not an appeal to the discretion of the Commissioner. The statute is mandatory as to the manner of assessment where invested capital cannot be determined (Davis v. Andrews, 2 B. T. A. 328). Under

paragraph (d) of section 327 assessment under section 328 can be granted only on application of the corporation, but under paragraph (a) the Commissioner computes the tax under section 328 without any application (Art. 901, Regulations 45 and Regulations 62).

The claim did not set aside invested capital as an immaterial factor. Under the claim it became necessary that the Commissioner determine invested capital if he could. If the Commissioner could determine the invested capital he would not grant special assessment. If he could not determine invested capital he was compelled to grant special assessment. *The determination of invested capital,* if that could be done, *was the first requirement of the audit of this claim.*

Furthermore, the claim set out in detail the very items of invested capital (that is, the very items of tangible and intangible assets, and how they were acquired, and the manner in which they were paid for), which were claimed as invested capital in the amendment to the claim and which are the bases of the cause of action in this suit. The audit of the claim compelled the Commissioner to determine the invested capital to be allowed for these items. The assessment asked for could be granted only if he found that he could not do so.

By the claim in this case, that the Commissioner could not determine invested capital, it was asserted that invested capital, as theretofore calculated, had omitted certain items of invested capital, which should be included

under the normal method of calculation of invested capital, and it is quite apparent that it not only did not renounce a claim to such additional invested capital, but by its very terms asserted the right to and demanded such additional invested capital.

Upon the logic of the Court in the Prentiss case judgment of the Court of Appeals in this case should be reversed.

The distinction contended for above is distinctly set out in the decision in the case of United States v. Factors & Finance Company. In that case the taxpayer filed a claim for refund for 1917 without any specification of error and after the Statute of Limitations barred the filing of a new claim filed a claim for special assessment. The Court said:

> "This is not a case where the grounds injected by the amendment have already been abandoned by agreement, tacit or express. Such abandonment and agreement there was in the Prentiss case, the claimant seeking at the beginning the privilege of the special method of assessment and reverting thereafter to another ground of challenge which by implication, if not expressly, it had promised to renounce. * * *
>
> "There are other elements of difference, however, besides the presence or absence of agreement that divide the Prentiss case from this one. *These other elements of difference are even more important*, for the Prentiss ruling would have been the same if agreement had been absent. When the two cases are considered in the light of administrative practice a distinction is to be noted at the outset between the na-

ture of a special assessment under the Revenue Act of 1918 [section 327 (d)] and the nature of such an assessment under the Act of 1917 (section 210). The application in the Prentiss case was made under section 327 (d) of the Act of 1918, whereby the taxpayer, ignoring a possible challenge of the computation of invested capital, plants itself upon the ground of a variance between the statutory definition and the economic concept, and calls upon the Commissioner to exercise a dispensing power given to him, in circumstances of hardship, by the provisions of the statute. In an application for special relief under section 210 of the Act of 1917, the grounds of challenge are very different if the letter of the section is the measure of relief thereunder. *The value of the invested capital under the statutory definition (Revenue Act of 1917, section 207) is not put aside in such circumstances as an irrelevant inquiry. On the contrary, it becomes the very essence of the claim by the taxpayer that there must be a recourse to another method.* Under section 210 of the Act of 1917, the special method is not permissible unless 'the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital.' *In brief, section 210 of the Act of 1917 is the precursor of section 327 (a) of the Act of 1918*, and is not at all the analogue of section 327 (d). (Cf. Williamsport Co. v. United States, 277 U. S. 551, 558)." (Italics supplied.)

It is plain that, where special assessment is sought under paragraph (a) of section 327, inquiry as to invested capital is not put aside, *but the duty to determine* invested

capital remains (if it can be done), and where the Commissioner finds that he can determine invested capital upon such a claim, which points out the items of omitted invested capital, he should make the refund which results therefrom.

An amendment, claiming additional invested capital, is an improper amendment of a claim under subdivision (d) of section 327 (Henry Prentiss & Company case), but is directly in line and a proper amendment of a claim under subdivision (a) of section 327 (this case).

The original claim in this case was sufficient without amendment. A claim that the Commissioner is unable to determine the invested capital, because he has omitted certain items of invested capital, which are set out in the claim, is itself a claim to such additional invested capital. That is the meaning of the decision in the Prentiss case as explained in the Factors and Finance decision.

The Court says (Factors and Finance case) that under such a claim "the value of the invested capital under the statutory definition * * * is not put aside in such circumstances as irrelevant; on the contrary, it becomes the very essence of the claim by the taxpayer that there must be a recourse to another method." Under this claim it was the duty of the Commissioner to audit the invested capital in order to determine whether or not he could determine invested capital, and the duty to make the refund, found by the required audit, necessarily follows.

The amendment in no manner changed the original

claim—it asserted only a right which existed under the claim itself. It was so asserted in the amendment (Ex. E, R. 58). Such an amendment is merely formal and in no manner changed the cause of action. At most, it changed the prayer for relief upon the cause of action stated in the original claim. The amendment was in no sense a departure from the original claim, but was a proper amendment which became part of, and related back to, the original claim.

II.

The Amendment Was Timely.

As is pointed out above, the amendment was unnecessary, because the original claim was sufficient. But we present now that the amendment was filed while the original claim was "*in fieri.*"

The Court of Appeals in this case ruled that, because the amendment was offered after the Commissioner notified the taxpayer of his purpose to reject the claim on the next schedule, it came too late.

In United States v. Memphis Cotton Oil Company, supra, it is said:

> "* * * He may disallow the claim promptly for a departure from the rule. If, however, he holds it without action until the form has been corrected, *and still more clearly if he hears it, and hears it on the*

merits, what is before him is not a double claim, but a claim single and indivisible, the new indissolubly welded into the structure of the old.

* * * * * * *

"One other question, less general in its significance, is yet to be considered. An argument is made that at the time of this amendment the claim had been finally rejected and the proceeding thereby ended. If so, it was too late (McKesson & Robbins v. Edwards, supra; Solomon v. United States, 57 F. [2d] 150). When correction is thus postponed, there is no longer anything to amend, any more than a lawsuit after the complaint has been dismissed We think the matter is still in fieri. True, the Deputy Commissioner had given notice to the taxpayer that the claims would be rejected and that the rejection would be officially announced in a schedule to be approved thereafter. *No reason is apparent why at any time before such approval the Commissioner or his Deputy was not at liberty to recall the first announcement, and dispose of the case otherwise* (Michel v. United States, 37 F. [2d] 38, reversed, but on other grounds, 282 U. S. 656). We are not now considering what the practice ought to be if there were need to open the proceedings for the submission of other evidence extrinsic to the claims themselves. Neither in the record nor in the argument do we find a suggestion of that need. Long before the amendment the Commissioner had ascertained the facts and had even notified the taxpayer of the justice of his claims and of the ruling of the Bureau that adjustments would be made accordingly. *The dismissal of the claims, when finally*

announced, was for defects of form only. The defects had been corrected and the dismissal may not stand." (Italics supplied.)

This statement directly destroys the basis of the decision of the Court of Appeals in the present case.

In the present case (as in the case of Memphis Cotton Oil Co.) the facts were before the Commissioner long before the amendment. In this case they were set out in the original claim for refund and (similarly to the Factors and Finance case and the case of McKesson & Robbins v. Edwards, 57 Fed. [2d] 147), after the notification by the Commissioner of an intention to deny the claims for refund on the next schedule, as shown by the stipulation of facts (R. 10), he accepted the amendment, audited the amended claims, arranged and held conferences with the taxpayer, caused the Revenue Agent to investigate the claims, allowed the additional invested capital and calculated the refund (refusing to make it only because of defects of form, and without any assertion that the original claims had been denied prior to the filing of the amendments), and stated even then (more than a year after the amendment was filed), that the claims would *then* be denied upon the next schedule. It will be noticed also from the stipulation of facts that the parties agreed that the plaintiff was entitled to recover if the claims for refund were sufficient, which would not have been true if the claims were denied before the amendment was offered, be-

cause then the suit would have been filed more than two years after the claims were denied. It is apparent that the amendments were offered before the claims were denied in this case.

Respectfully submitted,

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On Writ of Certiorari.

BRIEF ON BEHALF OF PETITIONER.

OPINION BELOW AND JURISDICTION.

The opinion of the United States Circuit Court of Appeals, Eight Circuit, is reported under the title "*Bemis Bros. Bag Company* v. *United States*," 60 Fed. (2d) 944–950 (Sup. Ct. Rec. 85–97).

This Court, pursuant to petition duly filed herein, and under the jurisdiction granted it by Section 240-A of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, C. 229, §1; Title 28, U. S. C. A., Sec. 347 [a]), has issued its writ of certiorari to the said Court of Appeals, and this case is now to be considered and determined by this Court under its said writ.

STATUTES AND REGULATIONS INVOLVED.

The applicable provisions of the statute and regulations involved, not copied in the argument, are set forth in Appendix (p. 24).

STATEMENT OF FACTS.

This suit was begun in the District Court of the United States for the Eastern District of Missouri *on January 2nd, 1929* (R. 1). Plaintiff (petitioner) seeks the recovery of income and profits taxes overpaid for 1918 and 1919. The petition alleged as one of the bases therefor the right to the additional invested capital hereinafter described.

At the trial of the case all of the facts were stipulated, and it was further stipulated as follows (R. 14):

> "If the plaintiff, within the time provided by law, filed claims for refund for the years 1918 and 1919, respectively, which, under the law, were sufficient to be the required preliminary for the maintenance of this action on that ground, above stated, then plaintiff will be entitled to judgment for the year 1918 in the amount of $14,054.18, with interest, and for the year 1919 in the amount of $9,073.15, with interest."

Copies of the original tax returns, claims for refund, the supplements or amendments to the claims, the Commissioner's letter to the Revenue Agent, the report of the Revenue Agent, and the Commissioner's letters to the taxpayer and the taxpayer's replies thereto are attached to the stipulation as exhibits to be considered as evidence in the case (R. 25 et. seq.).

The following facts appear from the stipulation and exhibits attached:

Petitioner filed its returns of income and invested capital for the years 1918 and 1919 in due time and paid the profits taxes and income taxes shown by such returns, respectively, at the quarterly due dates in 1919 and 1920. It paid an additional assessment of $98,549.28 for the year 1918 on June 30, 1920, and the balance thereof, $695.70, was paid in 1922 by a credit. It paid on December 16, 1920, an additional assessment for 1919, amounting to $34,630.31 (R. 10–11).

Petitioner overpaid its said taxes for the year 1918 in the amount of $14,054.18 and for the year 1919 in the amount of $9,073.15. The Commissioner of Internal Revenue refused to refund these overpayments because he alleged the claims for

refund filed within due time were not sufficient (R. 14, 73, 77).

On February 29, 1924, petitioner duly filed its claim for refund of taxes overpaid for 1918 (R. 11) and on December 12, 1924, it filed a similar claim for refund for 1919 (R. 11–12). *Both claims were timely.*

The claims for refund filed for both years were identical so far as the matter in controversy here is concerned (R. 25). They prayed that the excess profits and war profits taxes for 1918 and the excess profits tax for 1919 be determined in the manner provided in Section 328 of the Revenue Act of 1918 (approved February 24, 1919, 40 Stat. 1093, C. 18). (Appendix, p. 25.) A printed statement of facts which had been prepared in support of a claim for assessment of the 1917 taxes under Section 210 of the Revenue Act of 1917 (approved October 3, 1917, 40 Stat. 307, C. 63) was attached to and made a part of the claims for 1918 and 1919 (R. 30–51).

In this statement the right to special assessment rested upon three bases (R. 31): (1) The Commissioner is unable to determine the invested capital; (2) A mixed aggregate of tangible and intangible property has been paid in for stock, and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at time of payment; and (3) The tax if determined without the benefit of Section 210 (Section 328 of the 1918 Act), owing to abnormal conditions affecting the capital and income, would work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without the benefit of Section 210 (Section 328 of the 1918 Act) and the tax computed by such reference.

The claims asserted specifically the following facts, among others, as a reason why the Commissioner was unable to determine the invested capital:

(a) That the petitioner possessed certain brand printing plates and patterns made of metal, the cost of which was not included in petitioner's invested capital, as theretofore calculated by the Commissioner. All of the facts concerning the acquisition of said equipment, the weight of metal therein,

the cost of the metal, the manufacture of plates, patterns, matrices, and so forth, and the cost thereof, were set out in the claim for refund (R. 35).

(b) That petitioner at its organization had issued its capital stock specifically for good will and tangible property as a mixed aggregate, and that in order to determine the amount of the invested capital to be allowed for the good will, it was necessary to allocate that stock between the two classes of assets, which the Commissioner was unable to do. All of the facts concerning the value of the tangible properties and good will, how and when acquired, the capital stock issued therefor, and other pertinent facts were set out in the claims for refund, and it was stated that the Commissioner in his previous audit had not allowed any invested capital therefor (R. 37–41).

The original claims further stated that if the values or cost of the respective classes of property could be satisfactorily determined, petitioner would be entitled to additional invested capital, and cited the rulings and regulations pertaining thereto (R. 39).

On October 30, 1926, the Commissioner of Internal Revenue advised petitioner by letter that "the claim for 1919 will be rejected in full," and that the Collector "will be officially notified of the rejection at the expiration of thirty days from the date of this letter." In said letter, the Commissioner stated (R. 55):

> "You are advised that after careful consideration and review your application under the provisions of Section 327 of the Revenue Act of 1918 has been denied for the reason that the evidence presented fails to establish that your invested capital or net income is affected by abnormal conditions which would justify the Bureau in computing your tax under the provisions of Section 328 of the above-mentioned Act."

On November 27, 1926, the Commissioner by letter advised the petitioner that the claims for refund of taxes for both the years 1917 and 1919 would be rejected in full and that the Collector of Internal Revenue would be officially notified of the rejection (R. 56).

On December 13, 1926, petitioner sent a verified letter to the Commissioner protesting against the rejection of said claims for refund and, as one of the reasons, stated (R. 57–58):

> "(b) If the assessment of the excess profits taxes against the Company in the matter claimed in the above subdivision is denied, then the items heretofore presented which have been improperly eliminated from invested capital should be restored to invested capital and the excess profits tax recalculated on that basis."

In the said protest, petitioner listed the additions claimed to the surplus account, which is a summary of the items listed in the original claim, and stated that these items should be added to invested capital and the tax recomputed on that basis. *The list includes the printing equipment and the good will described above* (R. 58–59).

Hereafter we refer to the letter of December 13, 1926, as the amendment to the claim. The facts set forth in that letter were further elaborated in a verified letter of petitioner addressed to the Commissioner on April 12, 1927 (R. 61–68).

After he received said amendment the Commissioner of Internal Revenue reconsidered his previous ruling, proposing to reject said claims, held a conference with petitioner's representatives and caused its books to be investigated by a Revenue Agent in St. Louis upon the matters involved in said claims, recalculated the taxes and found the overpayments stated above (R. 12, 13). Under date of December 17, 1927, he sent a letter to petitioner (R. 68), *in which he found the petitioner was entitled to additional invested capital on account of the two assets above stated. He further found that petitioner had overpaid its taxes in the amount above stated, but refused to refund the overpayment for the reason stated as follows* (R. 73, 77):

> "Inasmuch as computation of your tax liability for 1918 and 1919 under the provisions of Sections 327 and 328 of the Revenue Act of 1918 is denied and your claim for the refunding of $1,270,907.97 for 1918 is confined to

> that point, *it will be rejected in full in the next schedule to be approved by the Commissioner.* (Italics supplied.)
>
> "Your claim for the computation of your tax liability for 1919 under the provisions of sections 327 and 328 has already been rejected."

The Commissioner of Internal Revenue gave no consideration or effect to said amendment.

Petitioner replied in detail to the Commissioner's letter under date of December 22, 1927 (R. 77–83), and took exception to the statement therein that the claim for refund for 1919 under the provisions of Sections 327 and 328 had already been rejected, stating (R. 78):

> "* * * *In this connection your attention is called to the fact that this ruling was immediately suspended and the taxpayer was granted further consideration of his claim.*" (Italics supplied.)

The judgment of the United States Circuit Court of Appeals rests upon two conclusions set forth in the Court's opinion, which are as follows:

(a) The Court ruled that the claims for refund were rejected by the Commissioner of Internal Revenue by his letters dated October 30, 1926, and November 27, 1926, and that the amendment filed December 13, 1926, could not be considered because it was offered after the claims were rejected (R. 93).

(b) The Court ruled that, although the original claims for refund set forth all of the facts which are alleged in the petition filed in the District Court and which are the basis of the action, the claims were not sufficient to sustain the suit because these facts were set forth in the claims in support of a prayer for assessment under said Section 328 of the Revenue Act of 1918, whereas the overpayment was found under Section 301 of said act (R. 95–96).

SUMMARY OF THE ARGUMENT.

1. The Court of Appeals without reason found the facts contrary to the stipulation of the facts and the record. The

Court of Appeals held that the claims for refund were rejected before December 13, 1926, when the amendment to the claims for refund was offered, and therefore the amendment came too late. This holding is based solely upon the statement in two letters (one for each year) written by the Commissioner of Internal Revenue in October and November, 1926, in which the Commissioner stated that the claims would be rejected on the next schedule. The parties by their stipulation, stating what conduct followed these letters, disclosed that the rejection was not actually made and the letter written by the Commissioner on December 17, 1927, stated, as to the claim for 1918, that it would then be rejected. Having stipulated all of the facts, following the letters, which the Court held constituted a rejection, the parties further stipulated that the plaintiff (petitioner) was entitled to recover judgment for the amount sued for, if its claim for refund was sufficient to be the foundation for the suit and thereby agreed that the date of the rejection of the claims for refund was immaterial to the case. This rejection became decisive of the case under the Court's ruling. The Court of Appeals decided the case upon an issue never made in the court below or at any time in the record.

2. The original claims for refund were sufficient without amendment, because they set up all the facts and described the additional invested capital upon which the suit in the District Court was based. The prayer in the claim that the taxes, by reason of these facts, be recalculated under section 328 was mere surplusage, as the Commissioner was compelled to so calculate the taxes if he was unable to determine the invested capital to be allowed for the assets described in the claim, such assets having not theretofore been entered in invested capital. If he was able to determine the invested capital to be allowed for such assets, then he was required to make any refund resulting therefrom, the facts only being required to be stated by the regulations. The prayer for special assessment could not and did not destroy the claim as one for the additional invested capital, set out in the claim. The original claims, without amendment, were sufficient as the

required preliminary for this suit, and under the stipulation of the parties judgment should have been given for the petitioner, even though the amendment were not considered.

3. The amendment merely demanded invested capital because of the cost of two assets, which in the original claims were set out as assets, the cost of which was not previously entered into the calculation of invested capital. The amendment merely demanded relief to which the facts set up in the original claim entitle petitioner. The amendment in no manner set up a new cause of action or a new ground of refund. It related back to and became a part of the original claims.

ARGUMENT.

1. The Court of Appeals, without reason, found the facts contrary to the stipulation of facts and the record.

Section 3226, Revised Statutes, as amended by the Revenue Act of 1926 (44 Stat. 116, C. 27; Title 26, U. S. C. A., Sec. 156), reads as follows:

> "Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which

such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

The parties stipulated the dates when the taxes were paid and when the claims for refund were filed, showing that such claims were timely. *The parties further stipulated that petitioner (plaintiff) is entitled to judgment "if the claims for refund filed by the plaintiff were sufficient to be the required preliminary for the maintenance of the suit."*

Notwithstanding this stipulation, the Court of Appeals held that the claims for refund were denied or rejected by the Commissioner of Internal Revenue, respectively, on October 30, 1926, and November 27, 1926, because the Commissioner on these dates wrote that the claims would be rejected on the next schedule. The Court so held notwithstanding, also, that the stipulation stated that thereafter plaintiff (petitioner) filed the amendment, described, to its original claims, that the Commissioner arranged and held a conference with the taxpayer's representatives, called for a conference thereon, requested a further statement from the taxpayer which was furnished, asked the Revenue Agent to investigate the facts, reviewed the Revenue Agent's report and wrote petitioner more than a year later in letter dated December 17, 1927, that the *claim for 1918 would thereafter be rejected* (R. 68–77). This letter also stated that the claim for 1919 had already been rejected, but petitioner replied thereto (R. 77–83) and without denial stated that the previous ruling as to 1919 had been suspended (R. 78).

The parties by the stipulation that plaintiff was entitled to recover, if the claims for refund were sufficient, avoided the necessity of setting out exactly when the claims were actually rejected. Nevertheless the Court of Appeals held that these letters constituted rejection, contrary to the stipulation of the parties and the facts inconsistent therewith above mentioned. This issue had never, theretofore, been raised.

The Court used the finding in an awkward, inept manner—that is, it held the amendments filed December 13, 1926, were

filed after the claims were rejected, but it is plain there is no basis for the finding for any purpose.

That the holding is contrary to the stipulation of the parties becomes apparent when the facts, as found by the Court of Appeals, are given proper effect. If the claims for refund were rejected at the date when the Court finds they were rejected, to wit, in 1926, then of course this *suit filed on January 2, 1929*, was instituted more than two years after the claims for refund were rejected, and would be barred by the two year clause in Section 3226 R. S. When the parties stipulated that plaintiff was entitled to recover under the conditions mentioned, they agreed, in effect, that the claims were rejected after January 2, 1927, and that the date of the rejection of the claims was immaterial, and that no defense could be maintained upon that basis. *The Court's decision is directly contrary to this stipulation, and can be justified only if a notice of an intention to reject is an irrevocable rejection of the claim.*

In the case of *United States* v. *Memphis Cotton Oil Company*, decided January 9, 1932 —— U. S. ——, 77 L. Ed. 291, this Court said:

> "One other question, less general in its significance, is yet to be considered. An argument is made that at the time of this amendment the claim had been finally rejected and the proceeding thereby ended. If so, it was too late (McKesson & Robbins *v.* Edwards, supra; Solomon *v.* United States, 57 F. [2d] 150). When correction is thus postponed, there is no longer anything to amend any more than a lawsuit after the complaint has been dismissed. *We think the matter is still in fieri.* True, the Deputy Commissioner had given notice to the taxpayer that the claims would be rejected, and that the rejection would be officially announced in a schedule to be approved thereafter. *No reason is apparent why at any time before such approval the Commissioner or his Deputy was not at liberty to recall the first announcement and dispose of the case otherwise* (Michel *v.* United States, 37 F. [2d] 38, reversed, but on other grounds, 282 U. S. 656). We are not now considering what the practice ought to be if there were need to open the proceedings for the submission of other evidence extrinsic to the claims themselves.

> Neither in the record nor in the argument do we find a suggestion of that need. Long before the amendment the Commissioner had ascertained the facts and had even notified the taxpayer of the justice of its claims and of the ruling of the Bureau that adjustments would be made accordingly. *The dismissal of the claims, when finally announced, was for defects of form only. The defects had been corrected and the dismissal may not stand.*" (Italics supplied.)

Upon facts going far beyond the facts in this case, the Court of Appeals in the case of *McKesson & Robbins* v. *Edwards*, 57 F. (2d) 147, cited by this Court with approval, *supra*, ruled that the claims were not rejected.

The Court of Appeals was quite apparently in error in this case.

2. The original claims for refund, without any amendment or supplement thereto, were sufficient as the required preliminary for this suit.

Section 301 of the Revenue Act of 1918 (approved Feb. 24, 1919, 40 Stat. 1088, C. 18) imposed an excess profits tax and war profits tax equal to certain percentages of the income, which percentages increased as the income exceeded named percentages of the invested capital.

Section 326 of the act defined invested capital.

Section 327 reads as follows:

> "Sec. 327. That in the following cases the tax shall be determined as provided in section 328:
>
> "(a) Where the Commissioner is unable to determine the invested capital as provided in section 326.
>
> "(b) In the case of a foreign corporation.
>
> "(c) Where a mixed aggregate of tangible and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds respectively.

"(d) Where, upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit under a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive."

In *United States* v. *Factors & Finance Company*, decided January 9, 1933, —— U. S. ——, 77 L. Ed. 302, the taxpayer filed a general claim for refund of taxes paid for 1917. In an amended claim the taxpayer set out the reasons why special assessment should be made under Section 210 of the Revenue Act of 1917. This Court held the amendment a proper amendment, saying:

"* * * In an application for special relief under Section 210 of the Act of 1917, the grounds of challenge are very different if the letter of the section is the measure of relief thereunder. The value of the invested capital under the statutory definition (Revenue Act of 1917, Section 207) is not put aside in such circumstances as an irrelevant inquiry. On the contrary, it becomes the very essence of the claim by the taxpayer that there must be a recourse to another method. Under Section 210 of the Act of 1917, the special method is not permissible unless 'the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital.' In brief, Section 210 of the Act of 1917 is the precursor of Section 327 (a) of the Act of 1918, and is not at all the analogue of section 327 (d). * * *

"* * * Under Section 210 of the Act of 1917, as under Section 327 (a) of the Act of 1918, the Commissioner acts of his own motion whenever he is unable to satisfy himself that the valuation will be accurate if there is adherence to the statute.

"This question, if no other, he must have considered and determined when a claim for refund was submitted by the taxpayer without specifying the grounds (United States *v.* Memphis Oil Company, —— U. S. ——). This question, if no other, he must again have considered and determined when he certified to the taxpayer, after the claim had been amended and after submission of the evidence, that Section 210 of the Act of 1917 supplied the applicable rule. * * *

"The cumulative force of these administrative opportunities and these procedural analogies upholds the claim and the amendment."

The claims for refund in this case rested first and primarily (another basis was included) upon the statement that the Commissioner is unable to determine invested capital, that is, upon subdivision (a) of Section 327 of the Revenue Act of 1918, which this Court ruled, in *U. S.* v. *Factors & Finance Co. supra*, follows and corresponds to Section 210 of the Revenue Act of 1917.

It is worthy of note that subdivision (c) of Section 327 is also a case where the Commissioner is unable to determine invested capital, because if he is unable to determine the respective values of the several classes of property, he can not determine the amount to be allowed for each.

The claims for refund in this case set out the two assets, described above, which, under section 326 of the act, constituted additional invested capital, and which had not been allowed as such, disclosing (and contending) that the tax was improperly calculated *under the normal method.*

Under these claims, as this Court rules above, it was the duty of the Commissioner, first, to investigate whether he could determine invested capital under Section 326 of the Revenue Act of 1918 and to do so he was compelled to determine the amount of invested capital which should be allowed be-

cause of the two items which he had theretofore omitted from his calculation. If he could not fix the amount of invested capital to be allowed because of these two items, then he was compelled to grant the prayer of the claim and calculate the taxes under Sections 327 and 328. And his only basis for denying this classification was that he could determine the invested capital, the first step that was required before he passed on the special assessment application.

The claims compelled him to audit these two items and find out whether or not he could determine the invested capital to be allowed for them, and if by the claims he was compelled to do so, then it follows, when he found that he could do so, he was compelled to make the refund resulting therefrom.

The original claims, under the ruling of this Court, were sufficient for the maintenance of this action, which rests upon the right to the very same invested capital which the Commissioner, as a result of the audit of the claims for refund, found that he could determine and which he did allow.

This is supported by consideration of the administrative practice and the "end and aim" of a claim. The Treasury Department regulations required only that the facts be stated in the claim for refund. Article 1306 of Regulation 65 (effective when claims filed) reads as follows:

> "Claims by the taxpayer for the refunding of taxes, interest, penalties and additions to the tax erroneously or illegally collected, shall be made on Form 843. All facts relied upon in support of the claim should be set forth clearly under oath."

The facts, alone, are required because it was assumed that the Commissioner knew the law and would give it effect. Paragraph b of Section 250 of the Revenue Act of 1918 (Appendix, page 25) required the Commissioner of Internal Revenue to audit returns and to assess deficiencies and to credit or refund to the taxpayer any overpayment. To audit a return the Commissioner only required the facts.

The departmental practice in the application of special assessment is set out in Regulations 45, Article 901, repeated

in Regulations 62, Article 901 (set out in Appendix, p. 26). As appears from this regulation, no application is necessary to secure assessment under Section 328 where the Commissioner is unable to determine invested capital. The practice is set out in detail in Prentice Hall, Federal Tax Service, Special Volume 1928 and Prior Laws, paragraph 33489, which reads as follows:

> "The Commissioner will compute the tax under Sec. 328 without application by the corporation in the following cases:
>
> "(1) Where the invested capital can not be determined under the provision of Sec. 326.
>
> "(2) For all foreign corporations.
>
> "(3) Where a mixed aggregate of tangibles and intangibles has been paid in for stock or for stock and bonds and the respective values of the several classes of property when paid in or the respective classes paid in for stock and for bonds can not be satisfactorily determined."

So far as this claim rested upon the right to additional invested capital, the prayer that the tax be determined under section 328 *was mere surplusage*. The statute is mandatory as to the manner of assessment in such case (appeal of *Davis & Andrews Co.*, 2 B. T. A. 328). Under subdivision (d) of Section 327 assessment can be granted under Section 328 only upon application of the taxpayer, and in such case the prayer for such assessment is necessary and material. But where subdivision (a) applies the Commissioner must compute the tax under Section 328 upon his own initiative and without any application by the taxpayer. Where, therefore, as in this case, invested capital not included in the Commissioner's previous calculation of invested capital is disclosed to him upon a claim for refund it is unnecessary to make any claim for any particular relief therefor. If the Commissioner can determine the amount of invested capital to be allowed therefor he must of his own initiative allow it as such and recalculate the tax under Section 301 of the act (Sections 250 and 252, Rev. Act of 1918), and if he can not determine such amount he must likewise of his own initiative calculate the tax under

Section 328 of the act. *The prayer for relief under Section 328 in such a case, being without any effect and utterly useless, could not constitute or identify the ground or basis of refund.*

The lower courts uniformly have held that a claim for refund which sets out the facts is a sufficient claim, although it alleges the wrong theory of relief (*Paul Jones & Co.* v. *Lucas*, 33 Fed. [2d] 907; *Warner* v. *Walsh*, 24 Fed. [2d] 449; *Union Trust Co. of Pittsburgh* v. *McCaughn*, 24 Fed. [2d] 459; *Dreyfuss Dry Goods Co.* v. *Lines*, 24 Fed. [2d] 29; *Neuland* v. *Bowers*, 38 Fed. [2d] 842; *Wunderle* v. *McCaughn*, 38 Fed. [2d] 258, 259).

Rules of pleading support this contention and disclose the sense of it. Generally it is held that the facts alleged identify a cause of action, and that the prayer for relief does not.

For instance, in *Parker State Bank* v. *Pennington*, 9 Fed. (2d) 966, the Court said (p. 970):

> "* * * The nature of the cause of action depends upon the facts pleaded in the complaint as a whole, and if it alleges an action upon a contract, the plaintiff is entitled to recover thereon, although the plaintiff alleges a conversion and remedies ex delicto are asked. * * *"

See, also:

49 C. J. (Pleadings), Section 188, p. 173.

Those facts (when set out in the claim) which cause reduction in the tax liability, so that a refund is owing, are the grounds for the claim, just as those facts which show the right of recovery in a petition or declaration are the cause of action therein.

In *U. S.* v. *Memphis Cotton Oil*, *supra*, concluding after reference to the rules of pleading, this Court said:

> "With this background of analogy, we reach the specific problem that calls for answer here. The respondent filed a claim for taxes overpaid, a claim for money had and received to his use by the agents of the government. The identity of the cause of action may be said in one aspect to depend upon the mere fact of overpayment, the existence of a net balance owing to the taxpayer after the

ascertainment of all items of debit and of credit. *In another aspect it may be said to depend upon the identity of the items illegally exacted, and hence upon the particular grounds that determine illegality.* Choice between these meanings must avoid a doctrinaire adherence to abstract definitions. It must keep in view the realities of administrative practice, for its effect will be to regulate the conduct of administrative officers. Definitions and analogies borrowed from pleadings in a lawsuit will have their place and recognition, but in due subordination to differences of end and aid. Viewing the problem thus, we must say whether a statement by the taxpayer of supporting facts and reasons is to be assimilated to a bill of particulars explanatory of a claim, or is something so essential that there can be no claim without it." (Italics supplied.)

Whether the cause of action in a claim is either of the alternatives stated by this Court—that is, whether it is the "mere fact of overpayment" or whether it is "the identity of the items illegally exacted," this claim was sufficient. "Whether the supporting facts and reasons be assimilated to a bill of particulars explanatory of a claim" or whether "there can be no claim without it" this claim was sufficient. When the facts concerning the additional invested capital were set forth in the claims for refund in this case (whether additional invested capital was asked as such, or because of such fact it was asserted the Commissioner had not and was unable to determine the invested capital and the taxpayer had requested assessment under Section 328) those facts constituted the cause of action, the grounds for refund, because those facts were the basis for the claim of overpayment—"the group of operative facts out of which the grievance develops—the items illegally exacted" must identify the cause of action—that is, the recovery sought, *when the claim is addressed to an administrator of the law, whose duty it is to apply whatever provision of the law is applicable to such group of operative facts.*

Also in *United States* v. *Henry Prentiss & Company*, — U. S. —, 77 L. Ed. 297, where the original claim for refund rested upon subdivision (d) of Section 327 of the Revenue Act of 1918

(it alleged only that the tax if determined without the benefit of Section 328, due to abnormal conditions affecting capital or income, would work exceptional hardship upon the taxpayer), this Court, in determining the propriety of the amendment, resorted to the analogies of law, subordinated to departmental procedure and practice. The Court there held that such claim was far apart from a claim of error in the normal method of calculation of the tax, and that an amendment claiming a refund resulting from additional invested capital was improper, because in the words of the Court:

> "The presentation of such a claim, unlike the presentation of a claim of error in fact or law, does not suggest the need for a new and general audit of the assets and liabilities." * * *

The Court also said:

> "* * * A statement, without explanation, to the effect that overpayments have been made in an aggregate amount is broad enough to cover any and all grounds for reassessment and return. *This at all events is true where the basis of the grievance is that the tax has been erroneously computed even by the normal method, that there has been a deviation, in other words, from the statutory rule.* * * *
>
> * * * * * * * * *
>
> "* * * *Upon a claim of deviation from the statute, the taxable balance for the year will be subject to reaudit, as if the tax were laid anew.* * * *" (Italics supplied.)

The two claims in the present case asserted that two items of invested capital had been omitted from the invested capital theretofore allowed, showed and claimed that the tax had been erroneously computed by the normal method; that there had "been a deviation from the statutory rule," necessitating a new and general audit of assets and liabilities" and the taxable balance. If these necessities arose upon the original claim, as this Court has held they did, then the original claims, without any amendment, were sufficient to require a refund of the overpayment resulting from the audit and were sufficient as the foundation for this suit.

The Court of Appeals should have directed judgment for petitioner, even though it disregarded the amendments.

3. The amendments or supplements filed on December 13, 1926, were proper amendments to the original claims for refund.

The amendments set out no new facts; they merely changed the prayer for relief.

In *United States* v. *Memphis Cotton Oil Company, supra,* upon the question of the propriety of an amendment, this Court reached the conclusion above quoted as to what constitutes the cause of action in a claim for refund. This Court refers to the analogies suggested by rules of pleading, of which reluctantly we limit quotation to the most pertinent statements:

> "Both the Government and the taxpayer invoke analogies suggested by pleadings in a lawsuit. The general rule is said to be that an amendment of a pleading will take effect by relation and thus relieve against the bar of an intervening limitation if the identity of the cause of action is still substantially the same, but that the limitation will prevail if under the guise of an amendment there is the substitution of a new cause of action in place of another wholly different (citations). The analogy is helpful, yet it will confuse, instead of helping, if we do not insist at the beginning upon a definition of our terms or at least a recognition of their shifting meanings. A 'cause of action' may mean one thing for one purpose and something different for another. * * * At times and in certain contexts it is identified with the infringement of a right or the violation of a duty. At other times and in other contexts it is a concept of the law of remedies, the identity of the cause being then dependent on that of the form of action or the writ. Another aspect reveals it as something separate from writs and remedies, the group of operative facts out of which a grievance has developed. This court has not committed itself to the view that the phrase is susceptible of any single definition that will be independent of the context or of the relation to be governed. None the less, it has fixed the limits of amendment with increasing liberality. * * * In Friederichsen *v.* Renard, 247 U. S.

> 207, a cause of action by a defrauded buyer to set aside a contract was turned into a cause of action to recover damages for deceit. 'Of course an argument can be made on the other side, but where a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of the opinion that a liberal rule should be applied' (*New York Central Railroad Co.* v. *Kinney*, *supra*, p. 346)."

As to the right and propriety of the amendment and the duty of the Commissioner thereafter, this Court concluded in the above case that:

> "In the light thus supplied by the practice of the Bureau, and the analogy of pleadings, the way is cleared for a conclusion. The line of division must be kept a sharp one between the function of a statute requiring the presentation of a claim within a given period of time, and the function of a regulation making provision as to form. The function of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research. The Commissioner has the remedy in his own hands if the claim as presented is so indefinite as to cause embarrassment to him or to others in his Bureau. He may disallow the claim promptly for a departure from the rule. If, however, he holds it without action until the form has been corrected, and still more clearly if he hears it, and hears it on the merits, what is before him is not a double claim, *but a claim single and indivisible, the new indissolubly welded in the structure of the old.*" (Italics supplied).

This Court says the function of the statute is to give protection against stale demands. The function of the regulation is to facilitate research. The original claims did both. The amendment did not add an iota to the grievance set up or to the "right infringed" or the "duty violated." It merely changed the prayer for relief.

A change of the prayer for relief is not a change of the cause

of action if the ground of grievance and the facts are not changed.

49 C. J. (Pleadings), Section 673, p. 510, and Section 695, p. 525; also
37 C. J., Limitation of Actions, Section 517, p. 1079, and Section 507, p. 1068.

In this case the "defendant had notice from the beginning that the plaintiff (petitioner) sets up and is trying to enforce a claim against it for specified conduct" (failure to allow invested capital for the two described assets) and "the reasons for the Statute of Limitations do not exist" (statement in *N. Y. Central* v. *Kinney*, quoted in *Memphis Cotton Oil Co.* case, *supra*).

The Commissioner held the claims and heard them on the merits, and the amendment and the original claims were "but a claim single and indivisible, the new indissolubly welded in the structure of the old."

In the case of *Henry Prentiss & Company*, *supra*, no facts were alleged; only a conclusion of right was asserted. The cause of grievance was identified as exceptional hardship resulting from the normal method of calculation, which, of course, did not call for a reaudit under the normal method. This Court held that the right asserted, being a right to discretionary relief calling for no audit of tax liability under the normal statutory method, could not be assimilated into a claim for relief resulting from such normal method of calculation.

The facts set forth in the original claims for refund in the present case, as is pointed out above, did call for such an audit. In the present case it was not only asserted that the Commissioner had not determined invested capital properly, but the very items constituting his error in the previous determination were called to his attention. These were the occasions of grievance and compelled him to make an audit of the normal method of calculation. By the facts, disclosed to him, it was shown that he had not theretofore properly determined in-

vested capital and he could conclude that he could determine invested capital properly only by doing it, that is, by reauditing the return and determining invested capital to be allowed for those facts.

So the amendment in this case praying that the facts, alleged originally as showing that the Commissioner could not determine invested capital, be given effect as such invested capital, could not be a change of the cause of action. It was the Commissioner's duty to give the facts effect in invested capital whenever they were disclosed to him. The prayer that he do so added nothing to his duty under the original claim; it merely pointed out his duty.

We submit that this Court's decision in *U. S.* v. *Factors & Finance Company, supra*, concludes this case: This Court there held that a general claim for refund for 1917 can be amended (after limitation bars the filing of a new claim) so as to claim assessment under Section 210 of the 1917 Act, upon the basis that the Commissioner can not determine invested capital as defined by the act. The converse must also be true, to wit: a claim (under Section 327 [a] of the 1918 Act corresponding to said Section 210 of the 1917 Act) upon the basis that the Commissioner can not determine invested capital as defined by the act may properly be amended to claim additional invested capital, and certainly so if the original claim set out and described the assets possessed, as additional invested capital, which by the amendment are merely claimed as such.

Moreover, the Commissioner held these claims until the amendment was filed, and he continuously granted hearings and considered them on the merits, and, as this Court points out in *United States* v. *Memphis Cotton Oil Co., supra*, the Commissioner can not thereafter reject them for lack of formality of the original claims.

4. Conclusion.

In the case of *United States* v. *Factors & Finance Co., supra*, the claim was a general claim, which the Court held could by amendment be converted into a claim for special relief under

Section 210 of the Revenue Act of 1917. In the case of *United States* v. *Memphis Cotton Oil Co*, *supra*, the claim was a general claim which the Court held could by amendment be converted into a claim for relief because of specific errors in the normal method of audit. In the case of *United States* v. *Henry Prentiss & Co.*, *supra*, the claim was a claim under Section 327 (d) of the Revenue Act of 1918, alleging only that the normal method of calculating the tax resulted in exceptional hardship against the taxpayer, and the Court held that this could not be converted into a claim of error in the normal method of calculation.

The Court in all of these cases looks for guidance to the rules of pleading, but co-ordinates such rules to the administrative practice and procedure in the audit of returns and claims for refund.

We submit that the minimum effect of these rulings is: (a) If the claim for refund required the Commissioner of Internal Revenue to audit the tax liability, under the normal method of calculation, then recovery of any refund may be had which results from that audit or the disclosure of any facts (brought to his notice before rejection) when such facts are given effect in the normal method of calculation, and (b) an amendment claiming the effect upon the tax, under the normal method of calculation, of facts set out in the original claim, is not a new claim, no departure at all from the original claim and relates back to and becomes part and parcel of the original claim.

The judgment of the Court of Appeals in this case is not sustained by any reason or logic and is contrary to the rulings of this Court referred to above. We respectfully submit that it should be reversed with directions to enter judgment for petitioner for $14,054.18, overpayment for 1918 and $9,073.15, overpayment for 1919, with interest upon said amounts from the dates of their respective payment.

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APPENDIX.

(Act February 24, 1919.)

REVENUE ACT OF 1918.

PART II—IMPOSITION OF TAX.

Sec. 301. (a) That, in lieu of the tax imposed by Title I of the Revenue Act of 1917, but in addition to the other taxe imposed by this act, there shall be levied, collected and pai for the taxable year 1918 upon the net income of every co poration a tax equal to the sum of the following:

First Bracket.

30 per centum of the amount of the net income in excess o the excess-profits credit (determined under section 312) an not in excess of 20 per centum of the invested capital.

Second Bracket.

65 per centum of the amount of the net income in excess o 20 per centum of the invested capital.

Third Bracket.

The sum, if any, by which 80 per centum of the amount o the net income in excess of the war-profits credit (determine under section 311) exceeds the amount of the tax compute under the first and second brackets.

(b) For the taxable year 1919 and each taxable year there after there shall be levied, collected and paid upon the ne income of every corporation (except corporations taxable unde subdivision [c] of this section) a tax equal to the sum of th following:

First Bracket.

20 per centum of the amount of the net income in exces of the excess-profits credit (determined under section 312) an not in excess of 20 per centum of the invested capital.

Second Bracket.

40 per centum of the amount of the net income in excess o 20 per centum of the invested capital.

* * * * * * * * *

PART V—INVESTED CAPITAL.

Sec. 325. * * *
Sec. 326. * * *
Sec. 327. * * *

Sec. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profit per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purpose of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

* * * * * * * * *

PART IV.—ADMINISTRATIVE PROVISIONS.

PAYMENT OF TAXES.

Sec. 250(a) * * *

Sec. 250 (b) As soon as practicable after the return is filed, the Commissioner shall examine it. If it then appears that the correct amount of the tax is greater or less than that shown in the return, the installments shall be recomputed. If the amount already paid exceeds that which should have been paid on the basis of the installments as recomputed, the excess so paid shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252.

If the amount already paid is less than that which should

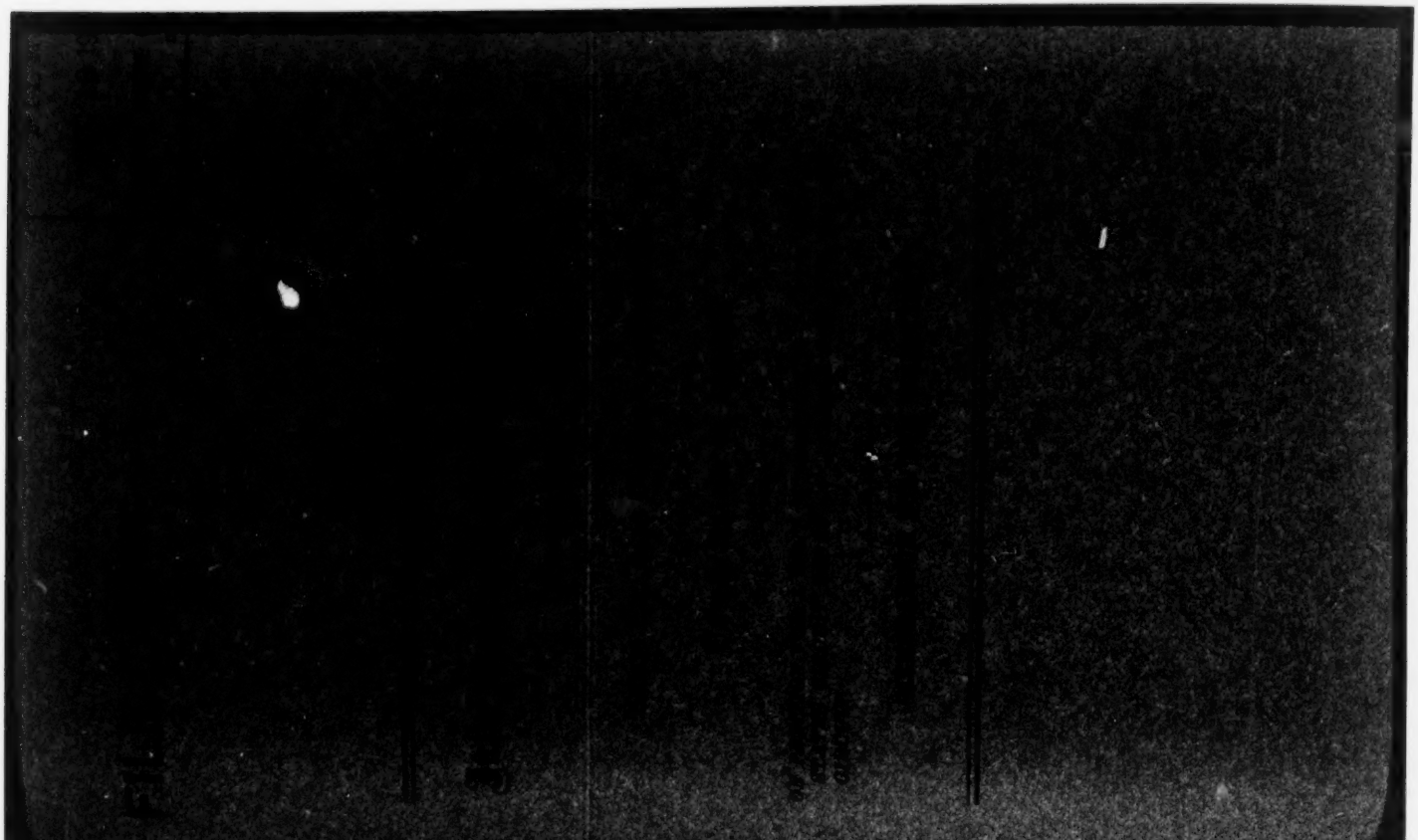
have been paid, the difference shall, to the extent not covered by any credits then due to the taxpayer under section 252, be paid upon notice and demand by the collector. * * *

* * * * * * * * *

Regulations.

Article 901, Regulations 45 and 62:

Art. 901. Treatment of special cases. In the cases specified in Section 327 of the statute the tax will be specially determined under the provisions of section 328, but the tax will not ordinarily be computed under section 328 merely because the corporation's form or manner of organization, or the limitations imposed by section 326, result in a greater tax than would otherwise be payable. A corporation which comes within the provisions of subdivision (d) of section 327 may make application for assessment under the provisions of section 328, which application shall be attached to its return in the form of a statement setting forth in full: (a) The reasons why the tax should be so determined; (b) the facts upon which such reasons are based; (c) an exact description of each trade or business or important branch of a trade or business carried on by it; (d) a statement of the invested capital and net income for each year since the beginning of the prewar period; and (e) a statement showing the amount of gains, profits, commissions or other income derived on a cost-plus basis from Government contracts made after April 5, 1917, and before November 12, 1918, and showing the per cent which such income is of the total income of the corporation. * * *



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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 515

BEMIS BRO. BAG COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In this case the petitioner filed timely claims for refund of its 1918 and 1919 taxes upon the ground that the excess and war profits taxes should be specially assessed under Sections 327 and 328 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1093). After consideration of the claims the Commissioner of Internal Revenue notified the petitioner that they would be rejected. (R. 57, 58.) There is nothing in the record which shows whether the rejection of these claims was ever included in a schedule signed by the Commissioner. After the

expiration of the statutory period for filing claims for refund the petitioner protested in writing against the rejection of its claims, specifying as an additional ground for refund that certain additions to its invested capital should be made. This ground was not stated in the original claims. The Commissioner reconsidered the claims, determined an overassessment for each year upon the new ground set forth in the protest, but stated that the amounts of the overassessments could not be allowed since they were not covered by proper claims for refund and were therefore barred by the statute of limitations. (R. 69, 79.)

In this suit to recover the amount of the overassessments, determined under the circumstances stated above, the court below held that the suit was barred because of the failure to file an adequate claim for refund specifying the ground upon which the overassessments were determined within the statutory period, and that the claim based upon that ground filed after the expiration of the period was not a compliance with the statutory condition. We believe that the judgment of the court below was correct.

The petitioner relies upon a conflict with the decisions of the Circuit Court of Appeals for the Second Circuit in *McKesson & Robbins* v. *Edwards*, 57 F. (2d) 147; and *Prentiss & Co.* v. *United States*, 57 F. (2d) 676; and with the decisions of the Court of Claims in *Factors & Finance Corp.* v. *United States*, 56 F. (2d) 902; and *Memphis Cotton Oil*

Co. v. *United States*, 59 F. (2d) 276. In the last three cases mentioned petitions for certiorari, filed by the Government, have been granted, and the cases are now pending after argument.[1]

We believe that this case is distinguishable from *United States* v. *Factors & Finance Corp.* and *United States* v. *Memphis Cotton Oil Co.* There is also some basis for distinction between the *Prentiss & Co. case* and this case. In the *Prentiss case* a letter stating that the taxpayer's claim for refund would be rejected was sent to the taxpayer. An amended claim for refund was filed, and after such filing, rejection of the claim was included in a rejection schedule. Although the opinion of the Circuit Court of Appeals indicates that that court may have considered the letter as a rejection, it seems clear that the final action of the Commissioner in rejecting the claim occurred when it was included in the rejection schedule. Accordingly, it is possible to regard the amended claim as filed before final rejection. In the instant case the record does not show that rejection of the petitioner's original claims for refund was noted in the rejection schedules after the letters were sent notifying the petitioner that its claims would be rejected. (R. 57–58.) The Court of Claims has held in several cases that, where the last act of the Commissioner in connection with the rejection of claims for refund

[1] *United States* v. *Prentiss & Co.*, No. 234, October Term, 1932; *United States* v. *Factors & Finance Corp.*, No. 141, October Term, 1932; *United States* v. *Memphis Cotton Oil Co.*, No. 308, October Term, 1932.

is the sending of a letter notifying the taxpayer that the claim for refund is to be rejected, such letter constitutes rejection. *Savannah Bank & Trust Co.* v. *United States,* 58 F. (2d) 1068 (C. Cls.); *New England Mutual Life Insurance Company* v. *United States,* 72 C. Cls. 658, 52 F. (2d) 1006; *The Daily Pantagraph, Inc.,* v. *United States,* 68 C. Cls. 251, 37 F. (2d) 783, certiorari granted on another question, 281 U. S. 716, and reversed, 282 U. S. 813. If the letters notifying the petitioner that its claims for refund would be rejected constitute rejection, then the case seems to present only the question whether claims for refund may be amended after rejection and after the statute of limitations upon the filing of claims for refund had expired. There are a number of decisions holding that a claim for refund may not be amended after rejection by the Commissioner. See *Jonesboro Grocer Co.* v. *United States,* 66 C. Cls. 320, certiorari denied, 280 U. S. 562; *Mutual Life Insurance Co.* v. *United States,* 72 C. Cls. 204, certiorari denied, 284 U. S. 628; *Solomon* v. *United States,* 57 F. (2d) 150 (C. C. A. 2d); *Wausau Sulphate Fibre Co.* v. *United States,* 72 C. Cls. 189.

Although the instant case may be distinguished from the *Prentiss & Co. case* upon the ground stated, we are not inclined to oppose the granting of a writ in this case, since the *Prentiss case* is now pending in this Court on the merits. However,

we respectfully suggest that consideration of the present petition be deferred until decision in the *Prentiss & Co. case,* since the decision in that case may make it unnecessary for the Court to grant review herein.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

DECEMBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1933

FILE COPY

JAN 10

No. 815

In the Supreme Court of the United States

OCTOBER TERM, 1942

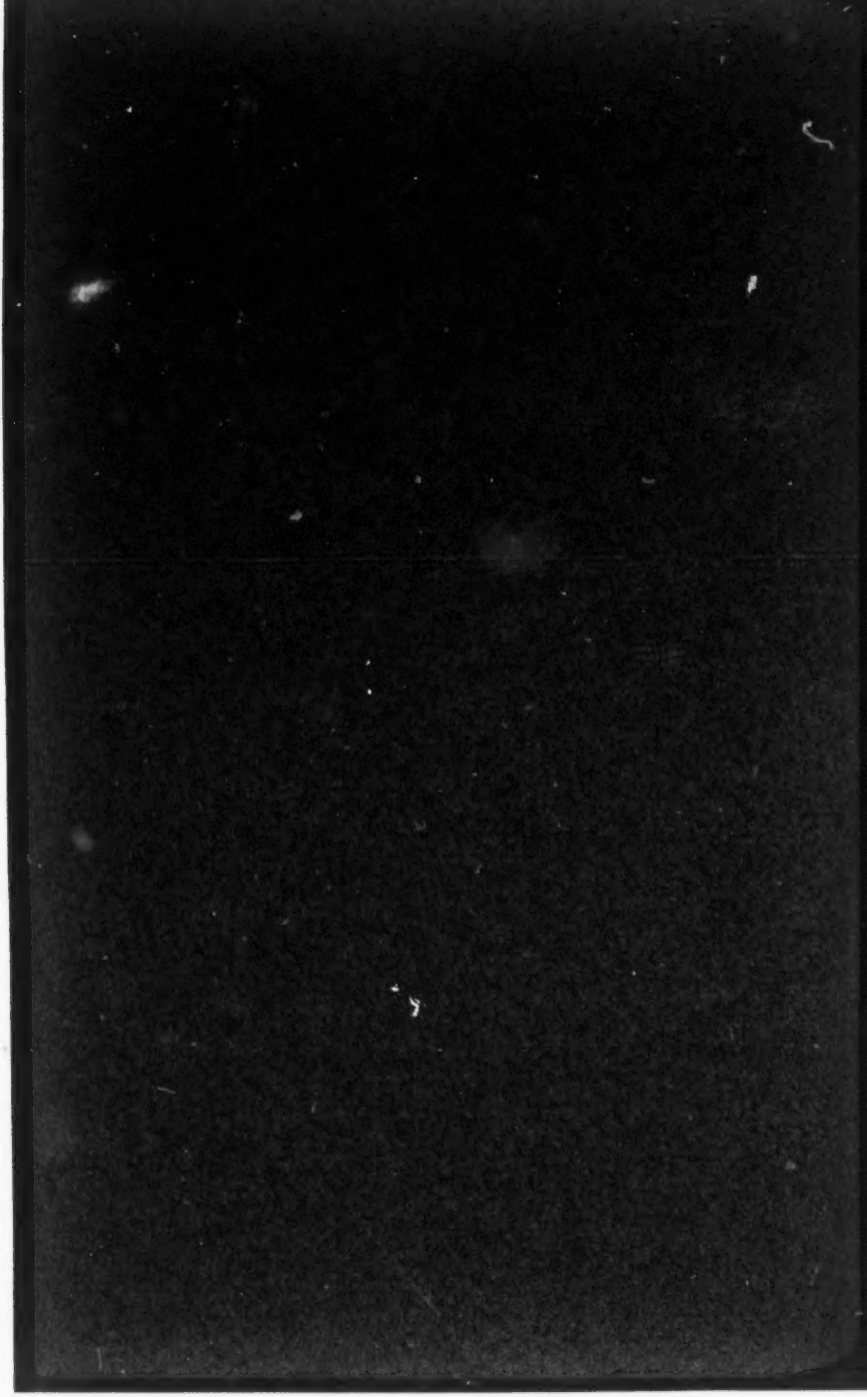
BERRY BRO. BAG COMPANY, A CORPORATION,
PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION



In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 515

BEMIS BRO. BAG COMPANY, A CORPORATION,
petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petition for certiorari in this case was not opposed by the respondent because there was then pending after argument in this Court the case of *Henry Prentiss & Co., Inc.* v. *United States,* 57 F. (2d) 676, (C. C. A. 2d), No. 234, October Term, 1932, which was said by petitioner to be in conflict with the instant case. In the memorandum filed on behalf of the respondent it was suggested that consideration of the petition be deferred until decision in the *Prentiss case,* since the decision in that case might

render it unnecessary for the Court to grant review herein. On January 9, 1933, the Court announced its decision in the *Prentiss case,* which we believe controls and disposes of the instant case and renders a review herein unnecessary.

In the *Prentiss case* the taxpayer filed a timely claim for refund of an alleged overpayment of 1918 taxes, specifying as the ground for refund that owing to abnormal conditions affecting its capital and income there could be no fair computation of the tax by valuation of its capital in accordance with the statutory definition and that its tax should be determined specially as provided for under Sections 327 (d) and 328 of the Revenue Act of 1918, c. 18, 40 Stat. 1057. In due course on July 16, 1925, the Commissioner notified the taxpayer that there was no evidence of abnormal conditions sufficient to warrant a special assessment of its taxes and that accordingly the claim for refund would be rejected. The proceeding was kept open, however, and thereafter the taxpayer was granted a hearing on its claim and filed an amended proof of claim, setting forth evidence of undervaluation of certain assets and assigning that fact as further ground for refund. The amended proof of claim was filed before final rejection of the original claims, but after the expiration of the statutory period within which an original claim for refund could be filed. The Commissioner finally rejected the claims by signing the rejection schedule on September 3, 1926. It was

held that the claim specifying as the sole ground for refund the necessity of a special assessment of the tax under Sections 327 (d) and 328 of the Revenue Act of 1918 could not be converted by amendment into a claim for refund on the ground of an erroneous valuation of capital under the statute (Section 326). Consequently, it was held that the amended proof of claim was ineffective as an amendment of the original claim, and since it was filed after the expiration of the statutory period for filing an original claim, it was not a sufficient compliance with statutory requirements to support a suit for refund on the ground therein specified.

The instant case is not distinguishable from the *Prentiss case* in any material respect. Here the petitioner filed on February 29 and December 12, 1924, respectively (R. 11, 12), timely claims for refund of 1918 and 1919 taxes, specifying as the ground therefor that its taxes should be specially assessed under Sections 327 (a) and (d) and 328 of the Revenue Act of 1918, because the Commissioner could not determine its capital in accordance with the statute and there were abnormal conditions affecting capital and income which would work a hardship if the tax were computed by valuation of capital according to the statute (R. 29–33, 53–55). In due course the Commissioner, after consideration of the claims, notified the petitioner on October 20 and November 27, 1926, that its claims would be rejected. (R. 57, 58.) The record does not disclose when, if at all, the claims were

included in a rejection schedule signed by the Commissioner. On December 13, 1926, after the expiration of the statutory period for the filing of claims for refund, the petitioner protested the rejection of its claims and asserted, as an additional ground for the refund, that its capital should be revised by restoring thereto certain items alleged to have been improperly eliminated. (R. 58–62.) The latter ground for refund was not asserted in the original claims. Upon reconsideration of the claims the Commissioner found overassessments of taxes for 1918 and 1919, upon the additional ground asserted in the protest, but notified the petitioner that the amounts thereof could not be refunded because not covered by proper claims and they were therefore barred by the statute of limitations. (R. 69–79.) The court below held that the suit for refund on the additional ground first asserted in the protest could not be maintained, because the original claims, having failed to assert the ground relied on, were not a sufficient compliance with statutory requirements and the claim asserting the ground relied on was filed after the expiration of the statutory period for filing refund claims. The court below further held that the protest was ineffectual as an amendment of the original claims such as would support the suit upon the additional ground.

The petitioner urges that the *Prentiss case* is distinguishable for the reason that here the claim for special assessment was based upon the inability

of the Commissioner to determine its capital, as well as upon the existence of abnormal conditions affecting capital and income, and that all the facts entitling the petitioner to a refund on the ground of undervaluation of capital, as asserted in the protest, were set forth in the original claims. We submit, however, that this circumstance affords no substantial distinction and is insufficient to take the instant case out of the rule of the *Prentiss case*. The principle there established is that a claim for refund on the ground that the tax should be determined specially because of abnormal conditions affecting capital and income may not be converted, by way of amendment after the expiration of the period of limitations for filing claims, into a claim for refund on the ground of undervaluation of capital as defined by statute and that a suit for refund on the latter ground can not be maintained.

The instant case falls within that principle. The original claims filed by the petitioner demanded refund on the ground that its taxes should be specially assessed not only because the Commissioner could not determine its capital in accordance with the statute but also because no fair computation of the tax could be made by valuation of capital according to the statute due to abnormal conditions affecting capital and income. While the original claims did set forth certain facts relating to erroneous eliminations from capital, they were given in connection with the allegation that capital could not be determined. The facts relating to capital eliminations

were not offered to support a refund on the ground of undervaluation of capital but were set forth solely to support the contention that special assessment should be allowed. Not until the protest was filed, after the statute of limitations had expired, did the petitioner claim refund of its taxes on the ground that capital should be revalued for the purpose of the statutory rate of the excess profits tax. The considerations upon which the decision in the *Prentiss case* was rested are present in the instant case. The petitioner places some reliance upon the fact that the record fails to show that it ever assented to the Commissioner's valuation of capital, which did appear in the *Prentiss case,* but as said by the Court in *United States* v. *Factors & Finance Co.* (No. 141, October Term, 1932), decided January 9, 1933, with the *Prentiss case,* "the Prentiss ruling would have been the same if agreement had been absent."

The fact that here special assessment was claimed as the ground for refund for the reason that capital could not be determined, as well as that abnormal conditions affected capital and income (which latter reason alone was assigned in the original claims involved in the *Prentiss case*) is not a distinguishing circumstance. While the two reasons require somewhat different administrative inquiry, both relate to the same end: administrative relief from the normal computation of the tax through the exercise of discretion in granting special assessment in lieu thereof.

We do not believe that the analysis in the opinion of the Court in the *Factors & Finance case* of the differences between the two bases for special assessment indicates that there is a distinction in principle between this case and the *Prentiss case.* In the *Factors & Finance case* the original claim for refund was general, specifying no particular grounds, and the amendment asserting the specific ground that the tax should be specially assessed was held sufficient, although filed after the statute of limitations expired but before rejection of the original claim.

The instant case is to be distinguished from *United States* v. *Memphis Cotton Oil Co.* (No. 308, October Term, 1932), also decided January 9, 1933, where it was held that a general claim for refund is subject to amendment at any time before final rejection although the statute of limitations may have expired. In the instant case the original claims for refund were based upon the specific ground that the tax should be specially assessed and the attempted amendment, filed after the statute of limitations had expired, asserted another and different specific ground. That fact distinguishes the *Factors & Finance* and *Memphis Oil Co. cases* from the instant case and also the *Prentiss case,* which we interpret as holding that a claim for refund based solely on an appeal to administrative discretion for special assessment is not subject to amendment, by asserting a basis for refund not involving

special assessment after the statute of limitations expires.

The possible distinction between the *Prentiss case* and this case, referred to in the original memorandum on behalf of the respondent (pp. 3–4), does not require review of this case in view of the basis upon which this Court's decision in the *Prentiss case* proceeded. The memorandum suggested that in the instant case there may have been a rejection before amendment, while rejection in the *Prentiss case* did not occur until after amendment. It is clear that if the letters notifying the petitioner that its claims would be rejected are a rejection of the claims, the attempted amendment in this case would be ineffective, for in that event the amendment was too late. See *United States* v. *Memphis Cotton Oil Co., supra.* The court below indicated that the claims were rejected by such letters and in the original memorandum for the respondent filed herein, authorities in support of that view are cited (p. 4).

The instant case is within the principle established by the *Prentiss case* and the rule there announced seems to control decision here. The decision of the court below is in accord with the decision of this Court in the *Prentiss case.* As the principles governing such cases have been so recently stated by this Court, further consideration of such questions by this Court seems to be unnecessary unless and until difficulties develop in the

application of those principles by administrative officers and the lower tribunals.

The petition for certiorari should be denied.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

JANUARY, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

FILE COPY

No. 516

In the Supreme Court of the United States

OCTOBER TERM, 1952

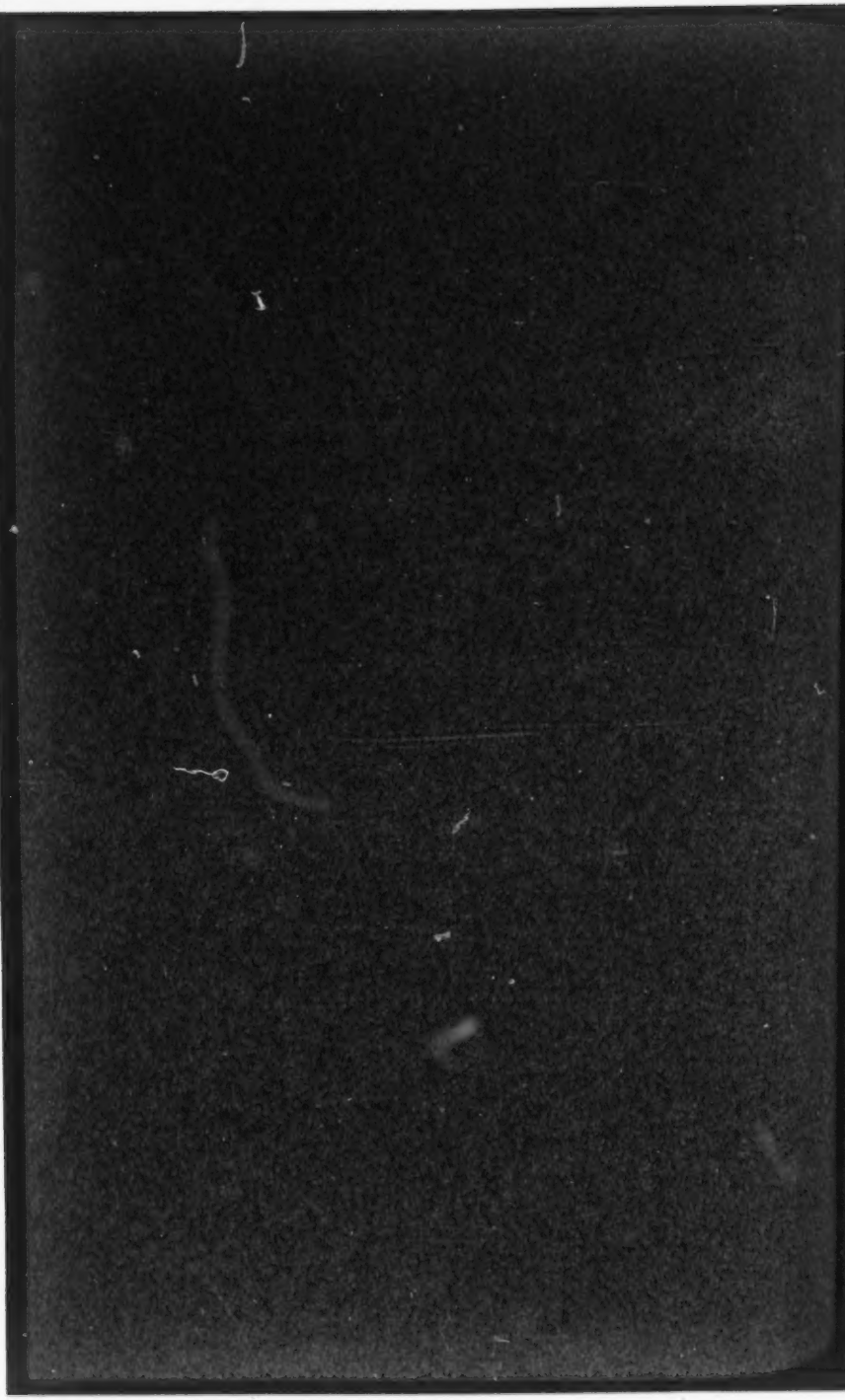
BEACON BRO. BOX COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES



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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 515

BEMIS BRO. BAG COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 20–22) is not reported. The opinion of the Circuit Court of Appeals (R. 85–97) is reported in 60 F. (2d) 944.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered September 1, 1932. (R. 97–98.) A petition for rehearing was denied September 30, 1932. (R. 102.) The petition for a writ of cer-

tiorari was filed November 19, 1932, and granted January 23, 1933. (R. 103.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether claims for refund (of taxes paid for 1918 and 1919) as originally filed by the taxpayer were sufficient to support a suit on the ground that invested capital had not been properly valued.

2. If the claims as originally filed were not sufficient to support a suit on that ground, whether they could be effectively amended after the statute of limitations had expired.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra*, pp. 29–33.

STATEMENT

This is an action brought to recover income and excess profits taxes paid by the petitioner for the years 1918 and 1919. The action was tried in the District Court without a jury on an agreed statement of facts. (R. 10–15.) The facts may be summarized as follows:

On May 15, 1919, the petitioner filed its completed corporation income and profits tax return for the calendar year 1918, and the tax shown as due was paid during the year. The Commissioner of Internal Revenue later assessed a deficiency for

1918, and this was paid on June 30, 1920, and May 18, 1922. (R. 10–11.)

On March 13, 1920, the petitioner filed its tax return for 1919 and the tax shown thereon was paid during the year. The Commissioner later assessed a deficiency for 1919, which the petitioner paid on December 16, 1920. (R. 11.)

On February 29, 1924, the petitioner filed a claim for refund of part of the taxes paid by it for 1918 (R. 11); and on December 12, 1924, it filed a claim for refund of part of the taxes paid for 1919 (R. 11–12).

The grounds of the refund claims were the same in each instance. Each claim asserted that the excess profits tax and the war profits tax for the respective years "should be assessed under the provisions of Section 327 and 328 of the Revenue Act of 1918"; and each stated that the "facts and argument" in support of the claim were contained in a brief field in support of a claim for refund filed for 1917. In each instance the 1917 brief was incorporated in the claim by reference. (R. 30, 54.)

The brief filed with the 1917 claim for refund was headed "In re Claim of Bemis Bro. Bag Company for Refund of Taxes for the Year 1917 Based Upon Right to Special Assessment," and it presented in detail "Reasons why the tax should be so determined and facts upon which such reasons are based." (R. 31.) It argued (1)

that the Commissioner was unable to determine the invested capital as provided in Section 207 of the Revenue Act of 1917; (2) that because a mixed aggregate of tangible and intangible property had been paid in for stock, the Commissioner was unable to satisfactorily determine the respective values of the several classes of property at the time of payment; and (3) that the tax, if determined without benefit of Section 210, owing to abnormal conditions affecting the capital and income, would work upon the corporation an exceptional hardship. (R. 31.)

In demonstrating that invested capital could not be determined as provided in Section 207, the brief gave as "illustrations" several items acquired in past years at large costs, which had been charged to expense, but which, it was alleged, should have been capitalized. Since the vouchers of those years were no longer in existence, the exact determination of the amounts and items was impossible. (R. 33.) "An outstanding instance" relied on in the brief was certain Brand Printing Plates, acquired through the years at large cost of labor and money, all of which had been charged to expense. (R. 35.)

In demonstrating that the Commissioner was unable to determine the respective values of tangibles and intangibles paid in for stock, the brief stated, among other things, that the petitioner was incorporated on May 8, 1885, with an authorized capital

stock of $350,000, and took over a going business theretofore successfully operated as a partnership. At the date of incorporation the partnership had developed a valuable good will. The stock was issued to the partners, who transferred to the petitioner all assets, tangible and intangible. (R. 37–39.) The brief stated (R. 39):

> If the value of the respective kinds of property could be satisfactorily determined this Company would be entitled to additional invested capital under the provisions of Article 57 of Regulations 44 and T. B. R. 49 and A. R. R. 307.[1] But in this case the value of the good will acquired at the organization was in excess of the total capital stock then issued and no proper allocation of the value of the property paid in for capital stock can be made. As stated in A. R. R. 307, that fact entitled this Company to assessment of its taxes under Section 210.

These circumstances, and others, the brief asserted, resulted in abnormal conditions affecting capital and income, and the tax, if determined without the benefit of Section 210, would work an exceptional hardship upon the company. (R. 40, 49.) The "Relief Sought," as stated in the conclusion of the brief, was as follows: "Relying upon the sufficiency of the facts above recited to entitle

[1] It should be noted that A. R. R. 307, 3 C. B. 344, had been specifically overruled by A. R. R. 2564, II–1 C. B. 199, in March, 1923, a year and a half before the petitioner's claims for refund were filed. See also A. R. R. 6092, III–1 C. B. 169, 170.

it to the assessment of its Excess Profits Tax liability under the provisions of Section 210 of the Revenue Act of 1917, Bemis Bro. Bag Company has heretofore presented a claim for refund for the year 1917." (R. 50.)

On October 30, 1926, the Commissioner notified the petitioner that, after careful consideration, the application for special assessment for 1919 had been denied because the evidence failed to establish that the invested capital or income was affected by abnormal conditions. The letter advised that the "claim for refund will be rejected in full" and the collector "will be officially notified of the rejection at the expiration of thirty days from the date of this letter." (R. 55.)

On November 27, 1926, the Commissioner notified the petitioner that, after careful consideration, the application for special assessment for 1918 had been denied since the audit disclosed no exceptional hardship. The letter advised that the claim "will be rejected in full," and that the collector "will be officially notified of the rejection." (R. 56.)

On December 13, 1926, the petitioner, in a letter to the Commissioner, protested "against the rejection of said claims" for the reason (1) that " The denial of said right must be based upon the use of improper comparatives as representative;" and (2) if the special assessment is denied, "then the items heretofore presented which have been improperly eliminated from invested capital should be restored to invested capital and the excess profits tax

recalculated on that basis." (R. 57–58.) The letter then entered into some discussion of several items referred to in the brief, among which were the printing equipment, and the good will referred to above. (R. 58–60.) The letter asked that, if special assessment were denied these items be restored to invested capital and the company's surplus increased accordingly. (R. 58–59.)

On April 12, 1927, and apparently in response to a request made at a conference with the Commissioner on February 23, 1927, which involved taxes for 1917 as well as 1918 and 1919, the petitioner wrote the Commissioner more detailed information concerning the printing equipment and the good will. (R. 61–68.)

On December 17, 1927 (R. 68), the Commissioner informed the petitioner that after careful consideration of its contention with respect to its taxes *for 1917*, the amount of $129,373.93 was restored to printing equipment and the balance of the $851,375.50 claimed by the petitioner, or $722,002.57, was disallowed for restoration to invested capital on the ground that it had been properly charged to expense (R. 70). As to the good will, the sum of $68,134.27 was allowed for intangibles acquired in 1885. (R. 71.) A refund for 1917 was accordingly allowed. The letter stated that the petitioner's contention for special assessment had been duly considered and no new evidence had been found to show that invested capital or net income was af-

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fected by abnormal conditions and special assessment "is, therefore, denied." (R. 72.) A recomputation of the tax liability for 1918 and 1919 taking into account the changes made for 1917 showed overassessments for those years in the sums of $14,054.18, and $9,073.15, respectively (R. 73); but these overassessments were disallowed because "not being covered by proper claims [they] are barred by the Statute of Limitations" (R. 77).

On December 22, 1927, the petitioner objected to this ruling (R. 77–83), and the Commissioner, on January 20, 1928 (R. 83), replied that in view of the fact that the basis of the claims filed for 1918 and 1919 was special assessment, and since special assessment was denied, no further action might be taken with respect to those claims. The letter stated that the case was closed on the basis of the Commissioner's letter of December 17, 1927. (R. 84.)

On January 2, 1929, the petitioner brought this action in the District Court. (R. 1.) The court held that the grounds contained in the claim for refund were not the grounds relied on in the suit and gave judgment for the United States. (R. 20–22.) The Circuit Court of Appeals affirmed. (R. 97.)

SUMMARY OF ARGUMENT

I

The claims for refund as originally filed were not sufficient to support a suit on the ground that in-

vested capital had been improperly valued. There can be no doubt that neither of the claims showed on its face that it was for error in the valuation of invested capital.

It is true that the brief attached to and made a part of the claims did set forth some facts relating to the valuation of the petitioner's invested capital, but these facts were given to support the contention that the case was one in which special assessment should be allowed. Nowhere in the claims nor in the brief, was it suggested or even intimated that the petitioner sought a revaluation of its capital.

In the light of the necessities and realities of administrative practice, this failure to make a specific claim for additions to invested capital amounted to a complete failure of the claim on that ground. When the organization of the Bureau is considered, it is clear that the claim gave the officials no notice of a claim for additions to invested capital, nor even notice of a claim broad enough to include a claim for additions to invested capital. The precise valuation of invested capital is irrelevant if special assessment is allowed and is not even a factor in determining the tax on that basis.

Moreover, the claim for special assessment did not suggest the need for a new and general audit of assets and liabilities. The original claims, including the attached brief, therefore, did not impel the Commissioner to revalue the petitioner's in-

vested capital. The point is graphically illustrated by the facts in this case.

II

If the original claims filed by the taxpayer were insufficient to support a suit on the ground that invested capital had been improperly valued, the decisions of this Court seem to make it plain that the claim could not be amended to include this ground after the expiration of the statute of limitations. In *United States* v. *Henry Prentiss & Co.*, No. 234, October Term, 1932, decided January 9, 1933, this Court held that a claim for refund based on special assessment could not be converted by amendment into a claim based on the ground of an erroneous valuation of capital.

The *Prentiss case* does not seem to be distinguishable on the ground that in the brief in support of its claim for special assessment the petitioner relied on subdivisions (a) and (c) of the statute, as well as (d). We do not believe that there is any distinction between the three subdivisions which is material in this case. The action of the Commissioner in granting or refusing special assessment under each of these subdivisions is discretionary and administrative.

The present case is plainly distinguishable from *United States* v. *Factors & Finance Co.*, No. 141, October Term, 1932, decided January 9, 1933. There, the original claim for refund was general and the claim for special assessment under Section

210 of the 1917 Act was held to fall within its terms. Here, the original claim was specific; it was based on special assessment, a ground which does not include the broader and different question of the valuation of invested capital.

ARGUMENT

I

THE ORIGINAL CLAIMS WERE NOT SUFFICIENT TO SUPPORT A SUIT ON THE GROUND THAT INVESTED CAPITAL HAD BEEN IMPROPERLY VALUED

If the claims for refund, as originally filed, were sufficient to support a suit on the ground that invested capital had not been properly valued, under the rule of *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269, no question concerning the validity or sufficiency of an amendment arises. We submit that the claims as originally filed were not sufficient to support a suit on the ground that invested capital had been improperly valued.

There can be no doubt that the claims for refund on their faces did not cover the correctness of the valuation of invested capital. The sole ground there stated was that the profits taxes "should be assessed under the provisions of Section 327 and 328 of the Revenue Act of 1918." (R. 30, 54.) Since a claim for special assessment may not be amended so as to bring in a claim for additions to invested capital (*United States* v. *Henry Prentiss & Co.*, No. 234, October Term, 1932,

decided January 9, 1933), it necessarily follows that a claim for special assessment is not sufficient to support a suit on the ground that invested capital has been improperly valued.

There could be no possible question as to the correctness of this conclusion were it not for the brief which was attached to the claims for refund and referred to in them. (R. 31–51.) This was a printed brief which had already been filed with the Bureau in support of a claim for special assessment of 1917 taxes under Section 210 of the Revenue Act of 1917 (*infra*, p. 29). We contend that this brief was not sufficient to enlarge the original claims into claims for the revaluation of invested capital.

It is true that the brief did set forth some facts relating to the valuation of the petitioner's invested capital, but these facts were given to support the contention that the case was one in which special assessment should be allowed. They were not offered to support a refund on the ground of undervaluation of capital; as the court below said (R. 95), they were "merely incidental." The petitioner made no claim or contention that its invested capital be revalued; on the contrary, its position was, in part, that its invested capital could not be determined. (R. 32.) The facts showing that certain capital items had not been returned were given "as illustrations" by which the petitioner sought to "demonstrate" the necessity for special assessment. Far from asking for revaluation, the

brief asserted that "the vouchers of those years are no longer in existence and the exact determination of amounts and items is impossible." (R. 33.) With respect to the contention that a mixed aggregate of tangible and intangible property had been paid in for stock, the brief asserted that "the value of the goodwill acquired at the organization was in excess of the total capital stock then issued and no proper allocation of the value of the property paid in for capital stock can be made." (R. 39.) This fact, it was stated, entitled the petitioner to special assessment. At the conclusion of the brief, under the heading "Relief Sought" the taxpayer stated that it was "relying upon the sufficiency of the facts above recited to entitle it to the assessment of its Excess Profits Tax liability under the provisions of Section 210 of the Revenue Act of 1917." (R. 50.)

It is thus apparent that the facts stated in the brief were advanced for the sole purpose of supporting the claim for special assessment. Nowhere in the claims nor in the brief was it suggested, or even intimated, that the petitioner sought a revaluation of its capital. The utmost that can be said is that the question was one of those "which merely lurk in the record," and accordingly was not fairly presented to the Commissioner for his decision. Cf. *Webster* v. *Fall*, 266 U. S. 507, 511.

This failure to make claim for additions to invested capital was not a mere formal defect.

In the light of the necessities and realities of administrative practice, it amounted to a complete failure to make any claim for the revaluation of capital. This is apparent when the organization of the Bureau and the method in which the petitioner's claim was necessarily handled are considered. The petitioner's claim on its face was solely a claim for special assessment, and consequently it was routed to the "Special Assessment Section" of the Bureau. A claim for the revaluation of invested capital would have been sent to "Section A" of the "Field Audit Review Division," for that was the office in the Bureau charged with the determination of "the statutory tax on corporations." See "Report of the Joint Committee on Internal Revenue Taxation," dated November 15, 1927, v. III, p. 133. Cf. "Investigation of the Bureau of Internal Revenue," Senate Report No. 27, Part 2, 69th Cong., 1st Sess., pp. 316–317; Schmeckebier and Eble, *The Bureau of Internal Revenue,* pp. 140–142, 182–183.[2]

As a consequence of this, the claim was considered by different persons and handled in an entirely different manner and from a different point of view than would have been the case if it had stated a claim for additions to invested capital. In

[2] The organization of the Bureau has, of course, changed from time to time, and these changes are reflected in the references given in the text. There is agreement, however, that "special assessment" cases are handled in a separate unit in the Bureau.

the light of the Bureau's practice, it is clear that the claim gave the officials no notice of a claim for additions to invested capital, nor even notice of a claim broad enough to include a claim for additions to invested capital. As this Court pointed out in the *Prentiss case*—

> The two proceedings, alike in form and in consequences, are essentially diverse. * * * The grievances differ so essentially that the assertion of the one must be felt to be unrelated to any complaint as to the other.

Here, even when the claim and the brief are considered together, there can be no doubt that the sole demand asserted by the taxpayer was that the Commissioner exercise the discretion lodged in him by Congress to grant a special assessment. Such a claim is not only "unrelated" to one of error in law or fact; it is inconsistent with such a claim.[3] It can not therefore be said that the original claims, including the brief, gave fair notice of any such claim.

Moreover, as this Court said in the *Prentiss case*, "The presentation of such a claim (for special assessment), unlike the presentation of a claim of error in fact or law, does not suggest the need for a new and general audit of assets and liabilities." This is apparent from the isolation of special assessment cases in the Bureau already referred to; and it is just as true whether special assessment

[3] Cf. note 6, *infra*, p. 24.

be sought under subdivision (a) and (c) and (d) of Section 327 of the Revenue Act of 1918 (*infra*, pp. 30–31), or under (d) alone. In considering an application for special assessment (under (a) and (c), as well as (d)), there are no compensating adjustments favorable to the Government which will move the Commissioner to reconsider the value of the intangibles, or other items of the invested capital as returned by the taxpayer, or any other factors relating to the ordinary computation of the tax, and thus make the ordinary tax either less or greater; if special assessment is allowed, invested capital under the statute and the ordinary tax are irrelevant (although the amount of net income is still material).

In the consideration of a claim based on a failure to value capital correctly under Section 326 the entire tax for the year will be subject to reaudit. Cf. *Lewis* v. *Reynolds*, 284 U. S. 281. But, in this case, if the Commissioner had determined that special assessment should be allowed, there would have been no reappraisement or increase of the petitioner's invested capital. Cf. "Refunds and Credits of Internal Revenue Taxes, 1929," House Doc. No. 478, 71st Cong., 2d Sess., p. 52. As this Court pointed out in the *Prentiss case*, a demand for special assessment under subdivision (d) is not a challenge to any act of the Commissioner in the valuation of invested capital; nor is a claim under (a) or (c) any different, for it does not require an exact valuation of invested capital, but rather a finding that capital

can not be satisfactorily determined. The precise valuation of invested capital is irrelevant if special assessment is allowed and is not even a factor in determining the tax on that basis. Consequently, the original claims, including the attached brief would not impel the Commissioner to revalue the petitioner's invested capital.

Of course it is not intended to suggest that the Commissioner, in passing on an application for special assessment, does not consider the taxpayer's invested capital. One of the questions he may have to decide is whether invested capital can be determined in accordance with Section 326. But this consideration is not different from that which was necessary in the *Prentiss case* to determine whether abnormal conditions existed, for Section 327 (d) specifically refers to "abnormal conditions affecting the *capital* or income of the corporation." (Italics ours.) This is obviously quite different from a complete reaudit, appraisal, and revaluation made necessary by an application to increase invested capital. In the one case, the Commissioner must determine facts with exactness as his aim; in the other he is required only to satisfy himself that statutory invested capital can be determined, or that there are no abnormal conditions affecting capital or income.

The point is graphically illustrated by the facts in this case. The burden of the brief attached to the petitioner's original claims was that it was

entitled to special assessment on all three of the grounds provided in Section 327. The Commissioner decided that invested capital could be determined in accordance with Section 326, and that there was no abnormality. He therefore notified the petitioner that its claim for special assessment was rejected. Thereafter the petitioner sent a letter, making for the first time a specific claim for a definite increase in invested capital in the amount of $1,419,178.79. (R. 58–59.)

In examining into this claim for a revaluation of capital the Commissioner was required to proceed in a manner entirely different from that which he had adopted in passing on the original claims for special assessment. In support of its new claim the petitioner advanced certain facts not contained in the brief filed with the original claims. (R. 58–60.) Thereafter a conference was had in the Commissioner's office. (R. 61.) The Commissioner sought more detailed information, and the taxpayer supplied this information, presenting not only detailed statements from its books and records, but facts outside its books, which had not been furnished to the Commissioner or considered by him before. (R. 61–67.) The Commissioner, having considered this additional information for several months, finally arrived at the conclusion that of the million and a half dollars increase claimed by the petitioner, $197,507.20 was properly includable in invested capital. (R. 68–77.) And it should not be overlooked that this conclusion was arrived

at with respect to the claim for 1917 taxes. The claim for that year sought an increase of invested capital (R. 68), and the overassessments found for 1918 and 1919 "resulted from the adjustments made with respect to 1917" (R. 84, 73–76).

If the Commissioner had been notified in the original claims that an increase in invested capital was being asked, he would have followed the same procedure in passing on those claims as he followed in passing on the contentions of the letter of protest. We submit that the requirements of administrative procedure support our contention that the original claims failed to give fair notice of a claim for the revaluation of invested capital, and were insufficient to support a suit on that basis.

II

THE ORIGINAL CLAIMS COULD NOT BE VALIDLY AMENDED AFTER THE STATUTE OF LIMITATIONS HAD EXPIRED

If the original claims filed by the taxpayer were insufficient to support a suit on the ground that invested capital had been improperly valued, the decisions of this Court seem to make it plain that the claim could not be amended to include this ground after the expiration of the statute of limitations.[4] In *United States* v. *Henry Prentiss & Co.*,

[4] The petitioner made no contention in the court below that its original claims for refund had been amended. This is apparent from the terms of the stipulation. (R. 14–15, par. XVIII.) In its brief in the court below (p. 31) the petitioner contended that "These letters did not present any new grounds for refund."

No. 234, October Term, 1932, decided January 9, 1933, the claim for refund filed by the taxpayer stated that it was based on the ground that "this corporation failed to accrue any New York State tax in 1918, and upon the ground that it is entitled to relief under sections 327–8 of the 1918 Act." (Ex. 3, facing R. 43, No. 234, Oct. Term, 1932.) This Court held that the claim could not be converted by amendment after the statute had run into a claim for refund on the ground of an erroneous valuation of capital under Section 326 of the statute.

We do not believe that the present case is distinguishable from the *Prentiss case* in any material respect. Here the petitioner filed claims for refund of 1918 and 1919 taxes, specifying as their sole ground (if our contentions in Point I are correct) that the tax "should be assessed under the provisions of Section 327 and 328 of the Revenue Act of 1918." (R. 30, 54.) In due course the Commissioner notified the petitioner that its claims would be rejected on the ground that no hardship or abnormal conditions sufficient to warrant special assessment had been disclosed. (R. 55, 56.) On December 13, 1926, after the expiration of the statutory period for the filing of claims for refund, the petitioner wrote a letter protesting the rejection of its claims, and asserted as a reason for its protest that if special assessment was not allowed its capital should be revised by restoring certain items alleged to have been improperly eliminated.

(R. 57–60.) It is not entirely clear that such a letter may properly be regarded as an amendment to a claim for refund. But in response to this letter the Commissioner reconsidered the original claims, together with a claim for 1917 (which was apparently based on both grounds (R. 68)), and found an overassessment for 1917, based on additions to invested capital. The adjustments made in invested capital with respect to 1917 resulted in overassessments for 1918 and 1919. (R. 84.) The Commissioner notified the petitioner of this fact but stated that no refund could be made because no claim on this basis had been filed within the period of the statute of limitations. (R. 68–77.) The *Prentiss case* seems to establish that the Commissioner's conclusion was correct and that the original claim specifying as its ground the necessity of special assessment could not be converted by amendment after the statute had run into a claim for refund on the ground of undervaluation of capital.

The *Prentiss case* does not appear to be distinguishable on the ground that in the brief in support of its claim for special assessment the petitioner here relied upon the inability of the Commissioner to determine its capital (Sec. 327(a)) and upon his inability to determine the respective values of tangibles and intangibles paid for stock (Sec. 327(c)) as well as upon the existence of abnormal conditions affecting capital and in-

come (Sec. 327(d)); while in the *Prentiss case* the existence of abnormal conditions only was relied on. In the first place, the premise does not seem to be entirely correct. Although "an abnormal condition" was referred to in the claim filed in the *Prentiss case*, the claim was based on "sections 327–8" generally. The claims in the present case were based on "Section 327 and 328." Moreover we do not think that there is any distinction between subdivisions (a) and (c) on the one hand and (d) on the other which is material in this case.

Under subdivisions (a) or (c) of Section 327, the action of the Commissioner in granting or refusing special assessment is discretionary and administrative, just as it is under Section 327 (d). As stated in *United States* v. *Factors & Finance Co.*, No. 141, October Term, 1932, decided January 9, 1933, the question of whether the Commissioner is unable to determine invested capital under Section 327 (a) "in last analysis is addressed to his own conscience, * * *."[5] Moreover, as shown in *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, the questions under Section 328 which must be passed on whenever special

[5] Cf. *Brown's "Shamrock" Linens* v. *Bowers*, 48 F. (2d) 103 (C. C. A. 2d), certiorari denied, 283 U. S. 865, which involved a foreign corporation, and thus came within subdivision (b). It was held that the Commissioner's determination was discretionary and not subject to judicial review. The court said (p. 104) that "the fact special assessment is mandatory for a foreign corporation and permissive for a domestic one furnishes no basis for distinction * * *."

assessment is allowed under any subdivision of Section 327 are questions of administrative discretion. Consequently, when the petitioner requested special assessment under Sections 327 and 328, it invoked the discretionary authority of the Commissioner. This Court's language in the *Prentiss case,* although written with respect to Section 327 (d), is therefore directly applicable. "If this amendment is permissible," the Court said, "a request for the exercise of a discretionary jurisdiction, will have been turned after the running of the statute, * * * into a claim of error of law or fact, and hence into a controversy within the jurisdiction of a court. What at the beginning was nonjusticiable, * * * will have become justiciable at the end." The Court then said:

> An amendment so far-reaching, a metamorphosis so complete, may well be thought to destroy the identity of the claim or cause of action if the analogies of pleading in a lawsuit are to govern our decision. A declaration according to the common count for money had and received may be good though it does not tell us how the money was received or the use established. *United States* v. *Memphis Oil Co., supra.* This does not mean that a pleader who abandons the common count and states the particular facts out of which his grievance has arisen retains unfettered freedom to change the statement at his pleasure. All will then depend on the degree and kind of the depar-

> ture. A cause of action alleging as a grievance that there has been a deviation from a rule of law or the breach of a legal duty in the collection of a tax is far apart from an appeal to an administrative officer to abandon the normal rule or method and substitute another, the substitution being dependent upon administrative discretion. Overpayments there may have been in each case, yet in senses widely different. * * *

Nor is the *Prentiss case* distinguishable on the ground that the present record fails to show that the petitioner ever assented to the original valuation of its invested capital;[6] for the Court said in the *Factors & Finance case, supra,* that the "*Prentiss* ruling would have been the same if agreement had been absent." Moreover as this Court pointed out in the *Prentiss case,* there is implicit in a claim for special assessment "an abandonment of any objection that capital and income had been erroneously valued if valuation was to be ascertained according to the normal method." The

[6] We are informed by the Bureau of Internal Revenue that the Income Tax Unit by letter dated December 23, 1924, asked the taxpayer to acquiesce in net income and invested capital for 1917 and 1918, as shown in the letter, and that the taxpayer under date of January 12, 1925, acquiesced in the net income and invested capital shown in the Bureau's letter. The trial occurred before this court decided the *Prentiss case*, and these facts were not then regarded as material. Accordingly, neither party offered evidence thereof, and they do not appear in the record, but would be susceptible of proof on a new trial.

Court continued with language which seems equally applicable here:

> There is room for argument that the taxpayer, having won the privilege of a hearing on those terms, is estopped from retracting its assent and resuming the abandoned ground. *Sturm* v. *Baker,* 150 U. S. 312, 333, 334; *Davis* v. *Wakelee,* 156 U. S. 680, 689. At least its assent is equivalent to an agreement that the claim for a special assessment shall be deemed to be a distinct one from that for a revision of the values. Retraction, if ever possible, must be held to be too late when the statute of limitations has interposed a bar.

We do not believe that the analysis in the opinion in the *Factors & Finance case* of the difference between special assessment under the 1917 Act and under Section 327 (d) of the 1918 Act indicates that there is a distinction in principle between this case and the *Prentiss case.*[7] In the *Factors & Finance case* the original claim for refund was general, specifying no particular ground, and the amendment asserting the specific ground that the tax should be specially assessed under Section 210 of the Revenue Act of 1917 was held sufficient.

The receipt by the Commissioner of a general claim, as shown in the *Prentiss case,* suggests the

[7] It is not entirely clear that special assessment under the 1917 Act is properly to be regarded as anything different from special assessment under the 1918 Act, despite the difference in the wording of the two provisions. As this Court pointed out in the *Prentiss case,* the practice of the Bureau

need of a new and general audit of assets and liabilities. In making this general audit the Commissioner must necessarily determine statutory invested capital and, under Section 210 of the 1917 Act (which was involved in the *Factors & Finance case*), if he is unable to determine invested capital his attention is directed immediately to the necessity for special assessment. But upon receipt of a claim for special assessment under Section 327 of the 1918 Act no revaluation of invested capital is required, and the Commissioner, in passing on special assessment, does not, as a practical matter, consider the question of the precise valuation of capital. He may consider whether he can determine invested capital, but if he can determine it he is not concerned with its amount. The general claim, such as that involved in the *Factors & Finance case*, includes the narrower questions under Section 327 (a) and (c) of the 1918 Act; but a

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has been criticized, but there seems to be reason to say that Section 327 of the 1918 Act was worded as it was as a legislative ratification of the practice under Section 210 of the 1917 Act. Section 327 is a restatement of Article 52 of Regulations 41, under Section 210 of the 1917 Act. These Regulations were promulgated on February 4, 1918, more than a year before the passage of the Revenue Act of 1918, and the casting of Section 327 in the same terms is a clear indication of legislative approval. Cf. the effect given to Sec. 501 (c) of the Revenue Act of 1932 in *Burnet* v. *Guggenheim*, No. 283, decided Feb. 6, 1933. See "Investigation of the Bureau of Internal Revenue," Senate Report No. 27, Part 2, 69th Cong., 1st Sess., p. 280; "Refunds and Credits of Internal Revenue Taxes," House Doc. No. 43, 71st Cong., 1st Sess., pp. 48–49, 69–74.

specific claim under those sections does not include the broader and different question of the valuation of invested capital.

United States v. *Memphis Oil Co.,* No. 308, October Term, 1932, decided January 9, 1933, is distinguishable on the same ground. That case involved an original general claim and it was held that it might be amended within the limits of its generality. Here the original claim was based on narrow and specific grounds and the letter of protest, written after the statute had expired, asserted another and different specific ground.

In any event, the taxpayer's amendments were not sufficient unless they were filed before the rejection of its claims for refund. *United States* v. *Memphis Oil Co., supra.* The record in this case does not disclose when the claims for refund were rejected, and the inference, as to 1919 at least, is that the claim was rejected before the letter of protest was received. (R. 77, 78.) If the validity of the amendment depends upon the date of the rejection, the taxpayer has failed to sustain the burden of proving the facts essential to its case. *Reinecke* v. *Spalding,* 280 U. S. 227, 232; *Phillips* v. *Dime Trust & S. D. Co.,* 284 U. S. 160, 167.

CONCLUSION

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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FEBRUARY, 1933.

APPENDIX

Revenue Act of 1917, c. 63, 40 Stat. 300, 307—

SEC. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.

For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used.

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1093—

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between

April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 343, 342—

SEC. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expira-

tion of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail." (U. S. C., Title 26, Sec. 156.)

SEC. 1012. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 281 of the Revenue Act of 1924, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum." (U. S. C., Title 26, Sec. 157.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 66—

SEC. 284. (b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three

or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund. (U. S. C. App., Title 26, Sec. 1065.)

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CHARLES ELMO

In The Supreme Court of The United States

OCTOBER TERM, 1932

BEMIS BROS. BAG COMPANY
vs.
UNITED STATES OF AMERICA
} No. 515

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF

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In The Supreme Court of The United States

OCTOBER TERM, 1932

BEMIS BROS. BAG COMPANY
vs.
UNITED STATES OF AMERICA
No. 515

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The undersigned, attorneys for taxpayers having cases pending in the Court of Claims and in the Bureau of Internal Revenue involving questions similar to those in the above case, respectfully move this Court for leave to file the subjoined brief as friends of the Court.

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BRIEF AMICI CURIAE

WHEN, IN CONSIDERING A CLAIM FOR REFUND OF TAXES, THE COMMISSIONER AUDITS THE ACCOUNTS OF THE TAXPAYER AND DETERMINES AN OVERPAYMENT HE WAIVES DEFECTS IN THE CLAIM, AND IT MAY BE AMENDED.

On January 9, 1933, this Court rendered its opinion in three cases involving the right of the taxpayer to amend a claim for refund after the statutory period for filing a new claim had expired but before final rejection of the original claim. In *United States* v. *Memphis Cotton Oil Company* the Court held that a claim for refund of tax, seasonably filed, which failed to state the grounds on which refund was sought, might be amended to state specific grounds constituting the basis for a refund at any time before the claim was finally rejected, where the Commissioner in considering the claim audited the accounts of the taxpayer and found that the tax had been overpaid. In *United States* v. *Factors & Finance Company* the Court reached a similar conclusion, where the claim was amended to ask special assessment on the grounds that the invested capital of the taxpayer could not be determined and the Commissioner proceeded to act upon the claim. In *United States* v. *Prentiss & Company* the Court held that a claim for special assessment filed under Section 327(d) of the Revenue Act of 1918, which did not require the Commissioner to investigate the invested capital of the taxpayer and he did not do so, could not be amended

to set out alleged errors committed in computing the invested capital.

A similar question is now before the Court upon somewhat different facts, but a decision in favor of the taxpayer seems to be clearly indicated by the principles laid down in the cases mentioned.

There is some disposition in official sources to interpret the three decisions of the Court rendered on January 9, 1933, as laying down the principle that a claim which specified no grounds may be amended while a claim that specifies grounds may not be amended. Such a conclusion appears to be wholly unjustified when the opinions are read as a whole, finding support only in certain language used in the *Prentiss* case and then only when such language is separated from its context. There is no reason to suppose this Court intends to grant greater rights to those who disregard the regulations of the Bureau of Internal Revenue than are granted to those who attempt to comply. The proper effect of the decisions appears to be that if the claim is such as to cause the Commissioner to make a reaudit of the accounts of the taxpayer, an amendment to set up the facts disclosed by that examination is proper. If the claim is such that no reexamination is either required or made, because the claim involves the exercise of an administrative discretion and not a reexamination into the income or invested capital, as in the *Prentiss* case, an amendment to set out errors in income or in invested capital would constitute a departure under the rules of pleading and should not be permitted.

Courts have been liberal in permitting the amendment of pleadings in the interests of justice. Un-

necessary injustice will be the result unless a liberal attitude is taken with respect to amendments to claims for refund. This Court has already indicated that amendments should be allowed which do not take the Commissioner by surprise or raise issues which he has not considered.

The Revenue Acts of 1917 and 1918, especially the former, were enacted as emergency measures and there were admittedly many defects in both laws.[1] Certainly, many taxpayers must have been confused by the enactment of laws which totally changed the form of taxation especially when it is considered that three excess (war) profits tax laws were enacted within the space of two years.[2] To illustrate we quote from Mr. Montgomery's statement of the confusion caused by the term "Invested Capital."[3]

> "Both friends and enemies of any tax based on capital values, as distinguished from a tax on net income, agree that determination of the base upon which the tax must be calculated is a most difficult problem. Neither the 1917 nor the 1918 law attempts to define 'capital.' Both laws use the term 'invested capital' and purport to define it, but do so merely by stating what the term includes and what it does not include, and thus leave much to the imagination. It is expected that as soon as the country can be said to be on a post-war basis, the war profits and excess profits taxes will be abandoned never to be revived except in the case of a similar emergency."

[1] See a contemporaneous discussion of the laws in Income Tax Procedure, 1918, Robert H. Montgomery, pp. 541–543; Income Tax Procedure, 1919, Robert H. Montgomery, pp. 691, 693, 717.

[2] Income Tax Procedure, 1919, *supra*, p. 691.

[3] *Idem*, p. 717.

The taxpayers were confronted with a tax which for 1918 imposed a Federal income and excess profits tax as high as 82.4% of the income.[1] They were urged to be patriotic and to pay their high taxes and to wait until the smoke cleared to adjust discrepancies.[2] In fact, they had no other alternative than to pay such taxes as might be assessed, and rely upon a subsequent refund of so much as might be excessive.

The practice of the Bureau of Internal Revenue was also in a turmoil and continued in that state until at least 1926. The Report of the Investigation of the Bureau of Internal Revenue stated (Part I, p. 214):

> "No scientific basis has been set up by the Bureau for determining when a company is entitled to special assessment."

Again it stated (Part II, p. 267):

> "The grounds for admitting to special assessment and the method of computing same should be published for the information of the taxpayer. At present the taxpayer can not properly set up a special assessment claim without inside information."

One of the principal statutory grounds for special assessment (and the only statutory ground in 1917) was that the invested capital could not be determined. Situations have frequently arisen where the Commissioner adjusted the invested capital to omit amounts or items claimed in the return because the Commissioner found that he could not determine

[1] Senate Report No. 27, Part I, p. 216: 69th Congress, First Session, 1925–1926.

[2] Income Tax Procedure, 1918, *supra*, p. 543.

value or cost at which they should be included. Such a case was clearly one for special assessment, yet when claim therefor was filed the Commissioern would again examine the invested capital situation and finding that it was then possible to determine such cost or value, deny special assessment. This situation would develop because of the different views of investigating agents as to the *quantum* of proof necessary. Taxpayers were at the mercy of the Commissioner and never knew whether or not the Commissioner would decide that invested capital could be determined.[1]

Administrative practice brings out that the Commissioner was unwilling thus to blow both hot and cold with the taxpaying public. He adopted with the approval of the Secretary of the Treasury the broad language of Treasury Decision 3240.[2] This Treasury Decision is an example of administrative methods adopted to remedy the injustices mentioned above. The Commissioner could and did waive defects in refund claims and heard and determined them on the merits. In the *Memphis Cotton Oil Company* case the Court, after pointing this out, said:

> "In the light thus supplied in the practice of the Bureau and the analogy of pleadings, the way is clear for a conclusion. The line of division must be kept a sharp one between the function of a statute requiring the presentation

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[1] Cf. A. R. R. 6965, III–1 C. B. 416 and A. R. R. 70, 2 C. B. 287.

[2] 5 C. B. 313, approved October 31, 1921. The more detailed provisions of T. D. 4235, VII–2 C. B. 76, were not approved until October 23, 1928—long after these cases were concluded in the Bureau of Internal Revenue.

of a claim within a given period of time and the function of a regulation making provision as to form. The function of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research. The Commissioner has the remedy in his own hands if the claim as presented is so indefinite as to cause embarrassment to him or to others in his Bureau. He may disallow the claim promptly for a departure from the rules. If, however, he holds it without action until the form has been corrected, and still more clearly if he hears it, and hears it on the merits, what is before him is not a double claim but a claim single and indivisible, the new indissolubly welded into the structure of the old."

Since the Commissioner, in determining the tax liability on the merits, has ascertained the facts, it is clear that the evidence has not been lost and that the claim may be allowed in the amount determined by the Commissioner without prejudice due to a stale demand. Since the purpose of the statute is to protect against stale demands and the purpose of the regulation in requiring the facts to be stated is to facilitate inquiry, no violence is done to either when the claim is amended to accord with facts found by the Commissioner. Having waived any defects and having heard the case on the merits, ascertained the facts and determined an overpayment on the merits, the Commissioner should not, at the conclusion of the hearings and after sufficient amending claims have been filed, be permitted to set up a defect which he has waived.

Certainly if the Commissioner can waive the defects of a claim for refund during the trial of a

case, he can waive defects of a claim while he is in fact still considering the matter. *Tucker* v. *Alexander*, 275 U. S. 288; *Bonwit Teller & Company* v. *United States*, 283 U. S. 258.

In the *Memphis Cotton Oil Company* decision the Court further said:

> "The ultimate question presented for decision upon a claim for refund is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability. No matter though the claim for refund be specific and limited, the Commissioner is at liberty to audit the return afresh and to strike a new balance as the facts then appear. * * * At once upon the filing of the claim for refund, there was an order for the complete examination of the business of the taxpayer to the end that the net amount of its tax liability might be reported to the Bureau. Every claim put forward in its amended notice has been investigated, every fact alleged in its behalf has been verified and found. The files of the Bureau contain the report of an examiner informing his superior that the tax has been overpaid, and the files of the taxpayer contain an official notice that the overassessment is recognized and that justice will be done. Of a sudden, at the end, the discovery is made that the inquiry is mere futility because the notice starting it in motion has departed in form from the requirements of a rule. * * * Long before the amendment, the Commissioner had ascertained the facts and had even notified the taxpayer of the justice of its claims and of the ruling of the Bureau that adjustments would be made accordingly."

In the *Prentiss* case the Court said:

"A revision for error of fact or law * * * may be made by the Commissioner on his own motion, for it is incidental to his general duty to audit the accounts."

CONCLUSION

When the Bureau has, pursuant to a claim for refund, determined facts upon which a refund is due to the taxpayer, and determined an overpayment, the Commissioner has waived any defects in the original claim and the taxpayer will be entitled to file an amending claim while the Commissioner is still considering the case on its merits.

If such amending claim sets forth facts and/or grounds which either the Commissioner should have considered under the doctrine of *Lewis* v. *Reynolds*, 284 U. S. 281, or in fact did consider, then the taxpayer is entitled to any merited refund so claimed. Such a rule harmonizes the analogy between the purpose of pleadings in a lawsuit as set forth in *Friedericksen* v. *Renard*, 247 U. S. 207, and the administrative practice of the Bureau in dealing with claims for refund.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 515.—October Term, 1932.

Bemis Bros. Bag Company, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 13, 1933.]

Mr. Justice Cardozo delivered the opinion of the Court.

The controversy to be determined presents another phase of a problem which has been much considered by the court in opinions recently announced. *United States* v. *Memphis Cotton Oil Co.*, — U. S. —; *United States* v. *Prentiss & Co.*, — U. S. —; *United States* v. *Factors & Finance Co.*, — U. S. —, January 9, 1933. There is need once again to decide whether a claim for the refund of a tax has been presented by the taxpayer in such a form as to be subject to amendment after a claim wholly new would be barred by limitation.

The petitioner, Bemis Bros. Bag Company, having made payment of excess profits taxes for 1918 and 1919, filed its claims for refund with the Commissioner of Internal Revenue. The claims contained a request for a special assessment under sections 327 and 328 of the Revenue Act of 1918, and in support of the request annexed a statement under oath which had been filed with a like claim as to the taxes of another year.

By the statement thus annexed, the right to the relief demanded is placed upon three grounds which are not to be confused.

The first is that the case is one "where the Commissioner is unable to determine the invested capital" in the ordinary way. This is the ground covered by section 327 (a) of the applicable statute.

The second is that the case is one "where a mixed aggregate of tangible and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to

determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively." This is the ground covered by section 327 (c).

The third is that the case is one where "the tax, if determined without the benefit of this section [327] would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without the benefit of this section and the tax computed by reference to the representative corporations specified in section 328." This is the ground covered by section 327 (d).

The taxpayer in presenting its claims to the Commissioner submitted facts and arguments in support of each of the three grounds.

To show that the invested capital had been inaccurately determined, and could not be accurately determined by resort to the usual methods, the taxpayer stated *inter alia* that the value of printing plates and patterns had been erroneously omitted, and that owing to the loss of vouchers and the changes wrought by the lapse of time, the value of these items could not be measured with complete precision, though it was susceptible even then of being fixed approximately. An estimate of the value was included in the claims.

To show that the case was one of a mixed aggregate of tangibles and intangibles paid for in stock, with the value of the several elements not subject to accurate division, the taxpayer made a statement of the corporate history and structure.

To show that there were abnormal conditions that would bring about injustice if the computation of the tax were to be made according to the usual method, and this though the invested capital were to be accurately determined, the taxpayer made a statement of the inequalities between its position and that of other corporations engaged in a like business.

Grounds numbers one and two gave notice to the Commissioner that the taxpayer's invested capital had been erroneously assessed and charged him with a duty to inquire into the error and to give appropriate relief. *United States* v. *Factors & Finance Co., supra.* If he found that items had been omitted, but that he was unable

to ascertain their value with reasonable accuracy, he might resort to section 328, and order the tax to be assessed in accordance with a special method. If he found that there had been omissions, but that he was able to his own satisfaction to identify and appraise them, he would learn in the process that there had been an undervaluation of invested capital, and that the assessment of the tax was correspondingly erroneous.

Ground number three is independent of the others, and has a different origin and meaning. "A demand for a special assessment in accordance with section 327 (d) of the statute of 1918 is not a challenge to any act of the Commissioner in the valuation of invested capital. On the contrary, the valuation of invested capital is irrelevant if the special method is accepted. The very basis of the application for the use of such a method is the presence of abnormal conditions whereby an unfair and disproportionate burden will be laid upon the taxpayer if invested capital is to be reckoned according to the statutory definition (§§ 325, 326), and the profits of the taxpayer subjected to a tax accordingly. Let the new method be adopted and the value of the invested capital ceases to be a factor in the process." *United States* v. *Prentiss & Co., supra.*

The Commissioner notified the taxpayer in October and November, 1926, that there was no evidence before him sufficient to justify relief under section 327 (d) on the ground of abnormal conditions in the business of the claimant as compared with that of others. He seems to have overlooked the fact that the taxpayer was claiming relief also under subdivisions (a) and (c). A protest promptly followed the delivery of the notice, and with the protest went an amended claim. In this amended claim there was no change of importance, unless importance be attached to the form of the relief demanded. The request for a computation in accordance with section 328 was accompanied by a request for relief in the alternative. In the event of a denial of a special assessment, the taxpayer now demanded that the items "improperly eliminated from invested capital should be restored to invested capital, and the excess profits tax recalculated on that basis." The Commissioner ordered another hearing, and considered the claim anew. Upon reconsideration he held that there had been an undervaluation of invested capital in 1918 and 1919 with the

result that the taxes for the one year had been overpaid in the sum of $14,054.18, and for the other in the sum of $9,073.15. After thus finding an error in the assessment, he dismissed the claims for refund on the ground that their form as first presented was defective and that the amendment came too late. Cf. *United States* v. *Memphis Cotton Oil Co., supra.* In a suit by the taxpayer to recover the moneys overpaid, the District Court gave judgment for the Government, and the Court of Appeals affirmed. 60 F. (2d) 944. The case is here on certiorari.

We held in *United States* v. *Prentiss & Co., supra,* that after the period of limitation a claim for a special assessment under section 327 (d) may not be turned by amendment into one for the reaudit of invested capital and for the reassessment of the tax accordingly. The two proceedings, it was pointed out, are essentially diverse. The one is non-justiciable, invoking, as it does, an administrative and discretionary jurisdiction. The other is akin to a judicial inquiry, reexamining an earlier determination for error of fact or law. The one "assumes adherence to the statute in the valuation of invested capital, and counts upon extraordinary conditions as justifying a claim that the statute is oppressive." The other, rejecting that assumption, is a demand for a new audit. The distinction between a special assessment under subdivision *d* and a claim for like relief under subdivisions *a* and *c* becomes apparent when the *Prentiss* case is compared with another case decided the same day. In *United States* v. *Factors & Finance Co., supra,* there had been a general claim for refund without statement of the grounds. The taxpayer tried to turn it by amendment into a claim for a special assessment under section 210 of the Revenue Act of 1917. The amendment was upheld. We pointed out, in upholding it, that "section 210 of the Act of 1917 is the precursor of section 327 (a) of the Act of 1918, and is not at all the analogue of section 327 (d)." Under section 210 of the earlier act, as under section 327 (a) of the later act, there is a challenge to the valuation of invested capital which opens up the whole subject for revision and readjustment.

We think procedural analogies and administrative practice sustain the contention of the petitioner that the claim as amended does not differ in matter of substance from the claim as first presented.

1. If we look to the analogy of pleadings in a lawsuit, the conclusion is not doubtful. The claim as first presented gives notice to the Commissioner that assets of great value have been omitted from invested capital. It tells him what those assets are, and even estimates their value, though imperfectly and roughly. There is no failure to make disclosures of the substance of the grievance, no dearth of information as to the facts that should be the prelude to inquiry. What is subject to criticism is this and nothing more, that the claim is niggardly, and hence defective, in its prayer for relief. It asks for a special assessment under sections 327 and 328. It should have asked for this, and in the alternative that invested capital be reexamined and increased. But for the purpose of determining the limits of permissible amendment, a change of the legal theory of a suit, "a departure from law to law," is no longer accepted as a test of general validity. *United States* v. *Memphis Cotton Oil Co., supra,* and cases there cited. Still weaker is a test derived from the prayer for relief, the mere demand for judgment. The rule is now general that at a trial upon the merits the suitor shall have the relief appropriate to the facts that he has pleaded, whether he has prayed for it or not.* Cf. Equity Rules 19 and 22. A claim for refund is not a pleading, and analogies borrowed from the forms and methods of a lawsuit will be applied to these administrative remedies "in due subordination to differences of end and aim." *United States* v. *Memphis Cotton Oil Co, supra.* Even so, they will have their place of influence, which may turn out to be controlling, if differences of end and aim are obscure or indecisive.

2. In this case administrative practice reinforces the suggestions of procedural analogies, and bids us follow where they point.

When a claim such as the one in controversy is submitted to a Commissioner, there is only one way in which it is possible for him to deal with it. He must look into the omitted items, and determine their effect upon the assessment he has made. If he finds that items have been omitted, and that by reason of their nature they make it impossible for him to determine the value of the capital, he will order a special assessment, for there will be nothing else to do. If he finds that they have been omitted, but that he is

*For a summary of the decisions see Clark on Code Pleading, p. 184.

able to appraise them, he will have learned in the course of the investigation that the assessment is erroneous in a determinable amount. Justice will then require that it be changed to that extent. In amending the claim by a prayer for alternative relief, a taxpayer is not forcing the inquiry into an unexplored territory, into strange and foreign paths. He is asking the Commissioner to take action upon discoveries already in the making or perhaps already made. There is no transfiguring amendment, such as we found in the *Prentiss* case, with its attempted change from a discretionary to a justiciable remedy. There is an adaptation of the relief to a case already proved.

The brief for the Government describes the division of functions between one section and another of the Bureau of Internal Revenue. A claim which appears on its face to be one for a special assessment is sent to the Special Assessment section. A claim for the revaluation of invested capital is sent to a section of the Field Audit Review Division. From this it ensues, we are told, that claims may be handled by different persons, and to some extent in different ways, according to the end in view. More than that must be shown to make out the contention that the substantial identity of the claim will be changed by this amendment. Whatever the distribution of labor may be between one division and another, it is impossible for any of them to pass upon a claim under section 327 (a) without also passing upon the question whether the valuation of the invested capital is wrong, and, if so, whether in a determinable or an indeterminable amount. Once let it be ascertained that the amount is determinable, and all that follows is an incident. At that point discovery has gone on to such a stage that the Commissioner may not rid himself of the duty of pressing forward to the end. He cannot in good conscience be satisfied with less. There may be need to take the case out of one section and transfer it to another before revision will be complete. All this is quite irrelevant when once a wrong is brought to light. There can be no stopping after that until justice has been done.

The judgment is

Reversed.